Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

DAVID L. FLEMING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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94pp

QUESTIONS PRESENTED FOR REVIEW

1. The court of appeals ruled that the statute of limitations applicable to *conspiracy* to conceal property in bankruptcy cannot begin to run until the limitations period for the substantive offense begins to run. Is the running of the statute of limitations for conspiracy to conceal property in bankruptcy delayed by 18 U.S.C. § 3284, even though Congress did not so provide?

2. The court of appeals ruled that Petitioner could be convicted of and punished for conspiracy to conceal property in a bankruptcy case even though the property involved was never property of the bankruptcy estate. Can one be convicted of and punished for conspiracy when the object of the alleged conspiracy, if accomplished, would not have constituted a federal crime?

3. The court of appeals declined to apply this Court's recent holding in *Neder v. United States, infra,* to require that a "materiality" instruction be given as to bankruptcy fraud. Does this Court's aforesaid decision require that such an instruction be given as to bankruptcy fraud?

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RULE 14.1.(d) COMPLIANCE

The court of appeals panel elected not to publish its opinion. Appendix ("App.") 1-22 However, under 11th Cir. R. 36-2 the opinion can be cited by the government throughout the circuit as persuasive authority, and under 11th Cir. R. 36-3 the opinion may still be published.

To Petitioner's knowledge, the district court's order, App. 23-44, has not been reported.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE SUPREME COURT

This Petition seeks a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The court of appeals issued its opinion on August 23, 1999. Petitioner filed a timely petition for rehearing and for *en banc* rehearing. The Petition for Rehearing and for *en banc* rehearing was denied on December 23, 1999. This Court has jurisdiction to grant a Writ of Certiorari under 28 U.S.C. § 1254(1). As to one of the issues raised in this Petition, the Court may also exercise its jurisdiction, in the alternative, under 28 U.S.C. § 1651(a) and/or 28 U.S.C. § 2241(a).

STATUTES INVOLVED

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the

United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceedings, any property belonging to the estate of a bankrupt;

* * *

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3284. Concealment of bankrupt's assets

The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

STATEMENT OF THE CASE

1. Jurisdiction of Court of Appeals

This Petition seeks the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The court of appeals decided a direct criminal appeal, as to which it had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

2. Procedural Background

Petitioner, David L. Fleming ("Fleming"), is an attorney who practiced law for nineteen years without any disciplinary problems.[1] Fleming was indicted, along with his client, Wallace C. Yost ("Yost") and another of Yost's attorneys, Stephen P. Oppenheim ("Oppenheim"), on May 28, 1997. In discovery, the government identified seven unindicted co-conspirators, all nonlawyers.[2] Fleming,

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[1] Fleming was admitted to the Florida Bar in 1978 and has not been the subject of any Bar complaint until his conviction, discussed *infra*, in this case. Subsequently, Fleming was admitted to practice before a number of federal district courts and courts of appeals, and Fleming was admitted to the Bar of the Supreme Court of the United States in 1996. As the result of this conviction, Fleming was automatically suspended by the Florida Supreme Court, effective August 23, 1998. Fleming recognizes that he is subject to suspension under Rule 8.1, Rules of the Supreme Court of the United States.

[2] An article entitled "First, Indict All the Lawyers," published in the January 25, 1999 edition of Forbes Magazine, which deals with a new trend toward indicting lawyers along with their clients when the lawyers assist their clients with business strategies which are over the line in the view of prosecutors, concludes by saying "[l]ooks like dirty pool to us."

Yost, and Oppenheim were all charged in the indictment with defrauding two banks, as well as conspiracy to defraud those banks. The conspiracy count also included conspiracy to commit mail fraud, wire fraud, bankruptcy fraud, and money laundering.[3]

Various pre-trial motions were directed to the indictment by Fleming and Oppenheim, including motions to sever (for separate trials), to dismiss the indictment, and for a bill of particulars. Fleming's motion to dismiss argues *inter alia* that the charge of conspiracy to commit bankruptcy fraud was barred by the statute of limitations. Only the motion for bill of particulars was granted, but the government was allowed, upon reconsideration, to avoid providing particulars as to any uncharged overt acts.

On the eve of trial, Yost entered into a plea agreement with the government, pursuant to which he pled guilty to the conspiracy and wire fraud counts and the government agreed to dismiss the remaining counts, subject to Yost's agreement to testify against Fleming and Oppenheim, which he did. The trial against Fleming and Oppenheim commenced on November 18, 1997 and lasted six days. As the result of motions in limine filed by Fleming and Oppenheim, the government announced at the beginning of trial that the charge of conspiracy to commit bankruptcy fraud would be limited to a single transaction involving a single piece of property, discussed

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[3] Yost was also indicted under a separate count for wire fraud, to which Fleming and Oppenheim were not alleged to have been parties.

infra. The jury was so instructed. App. 65 At the conclusion of the government's case, both Fleming and Oppenheim moved for acquittal, and their motions were denied. At the conclusion of the defendants' cases (the government offered no rebuttal), Fleming and Oppenheim renewed their motions for acquittal. The trial judge granted Oppenheim's motion, but denied Fleming's, finding that there was sufficient evidence for the case to go to the jury as to Fleming. After receiving instructions, the jury returned a verdict of guilty, entered December 1, 1997, against Fleming as to all counts. Fleming's sentencing was then scheduled for February 28, 1998 (subsequently postponed by trial court *sua sponte* to March 26, 1998), and Fleming was released on his own recognizance pending imposition of sentence.

While Fleming was awaiting the sentencing hearing, he filed a timely motion for post-verdict acquittal. On March 25, 1998, the trial court entered an order granting in part and denying in part the motion. App. 23-44 The order dismissed both bank fraud counts as well as the charge of conspiracy to commit bank fraud. App. 50 The order left the conviction in place as to conspiracy to commit bankruptcy fraud, wire and mail fraud, and money laundering. The next day, the trial court conducted the sentencing hearing and during that hearing concluded that conspiracy to commit mail and wire fraud and money laundering was barred by the statute of limitations but that conspiracy to commit bankruptcy fraud is governed by the separate statute of limitations for the substantive offense. Since the bankruptcy case was closed less than five years before the indictment, the trial judge let the conviction for conspiracy to commit bankruptcy

fraud stand. The trial court thereupon dismissed all charges under the conspiracy count except for conspiracy to commit bankruptcy fraud and sentenced Fleming to eighteen months imprisonment and probation and ordered him to pay restitution. Fleming was released on his own recognizance pending appeal. The judgment of conviction was entered on April 13, 1998. The judgment identifies June 4, 1991 as the date on which the offense concluded. App. 51-52

Fleming filed a timely appeal to the court of appeals for the Eleventh Circuit. The government did not cross appeal. Following the filing of briefs, oral argument occurred on April 20, 1999.[4] After oral argument but shortly before the court of appeals issued its opinion, this Court issued its opinion in *Neder v. United States*, cited *infra*, on June 10, 1999. On August 23, 1999, the court of appeals issued its opinion which affirmed Fleming's conviction. App. 1-22 The opinion deals with only two of the issues raised by Fleming on appeal, to wit: (1) the statute of limitations as a bar to conspiracy to commit bankruptcy fraud, and (2) conviction of conspiracy absent a substantive offense. Not having learned of the decision in *Neder v. United States*, in time to submit it as supplemental authority, Fleming filed a timely petition for rehearing. The petition relied on the lack of any jury instruction as to the materiality of bank fraud and bankruptcy fraud and uncontroverted evidence of withdrawal that would

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[4] The appeal was argued before two judges of the circuit court of appeals and a district judge sitting by designation. The district judge is a judge from the same judicial district out of which this case arises.

have commenced the running of the statute of limitations at a later date, but still outside of the limitations period. Fleming also requested an *en banc* rehearing. The court of appeals denied Fleming's petition for rehearing and for *en banc* rehearing on December 23, 1999, without comment. App. 45-47 Fleming filed a motion for stay of issuance of the court of appeals' mandate, and that motion was granted. App. 48-49

3. Statement of Facts

The indictment arises from Fleming's representation of companies owned by Yost in Chapter 11 bankruptcy cases filed in 1989 in the United States Bankruptcy Court for the Northern District of Florida and planning which preceded their filing. Yost was a high-profile entrepreneur and real estate developer in the Florida panhandle. On the eve of bankruptcy and faced with numerous pending foreclosures, Yost transferred numerous real properties to various existing corporations, so that they could file bankruptcy and protect the real estate through the automatic stay. Yost also began liquidating personal property owned by him and/or his wife. Some of the proceeds went toward providing financial support for the chapter 11 debtors. Yost used various means to conceal the proceeds from his personal property liquidations, which took place over a period of about seven years, from his personal creditors. Fleming was at least aware that Yost was liquidating assets, but he has claimed throughout to be uninvolved in Yost's concealment activities.[5]

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[5] The panel's opinion mentions a creditor's deposition at which Yost and his wife lied about their assets, (App. 7) but the

Yost never filed personal bankruptcy. (*Compra* App. 7 in which the court of appeals suggests some duty to account to the bankruptcy court for his personal assets).

Around April, 1991, Yost approached Fleming about selling a house at Pensacola Beach, Florida called the Matamoros property. The description of this property had been included in a deed, with numerous other properties, executed by Yost in favor of one of the bankrupt corporations, Mariner Realty Associates, Inc. ("MRA"). The real estate was valued in MRA's bankruptcy schedules at $180,000.00. Yost also informed Fleming that he and his wife had personal property to sell along with the real estate, and Fleming recommended separate contracts as to the real and personal property. The purchase price of the real estate was $200,000 and the purchase price for the personal property was $50,000. The $200,000.00 would cover most of the first mortgage balance. Yost represented to Fleming that the $50,000 would be used to pay

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trial judge dismissed the bank fraud and conspiracy to commit bank fraud charges against Fleming based upon a finding that Fleming had nothing to do with that deposition. App. 34-35 Fleming stopped representing Yost personally once the Chapter 11 cases were filed. The trial court found that Fleming's activities, other than those relating to the sale of the Matamoros property discussed *infra*, amounted to no more than utilization of available legal proceedings in order to represent his client. *Id.* In an effort to further demonstrate Fleming's bad intent, the court of appeals' opinion mentions a January, 1990 hearing at which Fleming made a representation as to Yost's assets. App. 7 What the record actually shows is that Fleming was merely restating in argument testimony given by Yost and that the hearing substantially predated the bulk of Yost's liquidation of his assets, which accelerated dramatically from and after 1991.

taxes owed by MRA. The funds for the personal property were held in an escrow account controlled by Fleming and the funds for the real estate were held in escrow by a title company. Believing that the Matamoros property belonged to MRA, Fleming thereupon filed a notice of sale in MRA's bankruptcy case but did not mention the side sale of personalty in the notice. Yost provided Fleming with a list of personal property, with which Fleming was not satisfied, and Yost subsequently provided another list. When the real estate transaction was subsequently referred to the title company for closing, its title search revealed that the Matamoros real estate had always been titled in the joint names of Yost and his wife, which in Florida means that the attempt to transfer the property to MRA was a nullity and that the Matamoros property never became property of MRA or its bankruptcy estate.[6]

The title company required releases from the first mortgage holder (balance due approximately $213,000), a second lienholder (judgment) and the joinder of Yost's wife. Fleming assisted in obtaining those. Shortly before closing, Yost advised Fleming that his wife would not allow the $50,000 to be used for MRA. After acrimonious discussions, Fleming agreed to release the $50,000 from escrow to Yost and his wife if Fleming was allowed to retain about $11,750 for pre-bankruptcy legal work done for Yost and/or his wife. Both the real estate transaction

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[6] Only Yost, without his wife, executed the deed to MRA. Counsel for the government stated at trial that this was the reason that Fleming was not indicted for substantive bankruptcy fraud.

and the personal property transaction were closed by the title company in June, 1991, at which time Fleming disbursed the balance in the personal property escrow to Yost and his wife. Fleming testified that he had no knowledge of what the Yosts did with those funds, and there is no evidence that he did.[7]

Fleming continued to represent MRA in its Chapter 11 case after the Matamoros transaction. According to the testimony[8] of an unindicted co-conspirator who became President of MRA after Yost resigned, George Williams, relations between Yost and Fleming were hostile after the Matamoros transaction, and Fleming refused to allow Yost to obtain any further personal advantage from MRA's case. *See* App. 53-60 This provides uncontroverted evidence of withdrawal prior to the end of 1991. MRA's Chapter 11 case ultimately resulted in the confirmation of a Chapter 11 liquidation plan.

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[7] In refusing at sentencing to enhance Fleming's sentence based on obstruction of justice, the trial court found that Fleming testified truthfully at trial. Attempting to bolster its decision, the court of appeals implies in its factual recital that Fleming perjured himself in a 1991 deposition about his fees. App. 9 This alleged "bad act" is not mentioned anywhere in the indictment as an "overt act". Suffice it to say for present purposes that the record does not support a finding of perjury, nor was Fleming ever so charged, and recitation of this impertinent and immaterial matter is unwarranted.

[8] This testimony is the basis for Fleming's petition for rehearing to the court of appeals on the ground that his withdrawal commenced the running of the statute of limitations even if it started to run later than June 4, 1991.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. THE DECISION OF THE COURT OF APPEALS INTERPRETS THE STATUTE OF LIMITATIONS IN A MANNER WHICH CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND ANOTHER COURT OF APPEALS

The court of appeals holds in its opinion that the limitations period provided by 18 U.S.C. § 3282 for a conspiracy to conceal property in bankruptcy, in violation of 18 U.S.C. § 371, cannot begin to run until the statute for the substantive offense, 18 U.S.C. § 152, begins to run under 18 U.S.C. § 3284. No authority is cited for this proposition.[9] Acknowledging that its decision conflicts with *United States v. Dolan*, 120 F.3d 856 (8th Cir. 1997), the court of appeals stated that it is not bound by *Dolan*. App. 13-14 The *Dolan* court did in fact state directly that the statute of limitations for a § 371 conspiracy to conceal assets in bankruptcy is § 3282 and that the limitations period begins to run "from the occurrence of the last overt act committed in furtherance of the conspiracy that is set forth in the indictment." *Id.*, at 864. The court of appeals in the present case concluded, to the contrary, that a conspiracy to conceal assets in bankruptcy is a continuing conspiracy, regardless of when the last overt

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[9] The panel apparently acknowledges that § 3282 is applicable in light of this Court's decision in *United States v. Rabinowich*, 238 U.S. 78, 59 L.Ed. 1211, 35 S.Ct. 682 (1915) and the other authorities relied upon by Fleming. This Court held in *Rabinowich* that conspiracy is a separate crime and the statute of limitations applicable to conspiracy to commit bankruptcy fraud is the general statute of limitations rather than that which applies to the substantive offense.

act was committed, and that in light of § 3284, the conspiracy cannot be deemed completed until the statute of limitations begins to run under § 3284. No matter how awkward this may sound, it is exactly what the court of appeals decided. One has to wonder why such judicial machinations are necessary when Congress could simply have mentioned "conspiracy" in § 3284 as it did in 26 U.S.C. § 6531 (statute of limitations for tax fraud enacted about two years after § 3284). Had the court of appeals followed *Dolan*, it would have simply acknowledged that the trial court's judgment, based on the government's own limitation of the scope of the subject conspiracy, finds that the offense was concluded more than five years prior to the indictment[10] and that § 3282 required a dismissal.

It should perhaps be noted that the government contended on appeal that it is § 3284, not § 3282, that is applicable to a conspiracy to conceal assets in bankruptcy. Fleming has found only one other reported case in which the government made (without success) that contention. *See United States v. Stein*, 249 F.Supp. 873 (ED Pa. 1966).

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[10] If as in *Dolan* the government in the present case alleged and proved that some action was taken in the subject bankruptcy case, after the object of the conspiracy was accomplished but before the case was closed, which furthered its objective, then the result reached by the court of appeals would be warranted and could have been reached without standing the rules of statutory interpretation on their heads. In the present case, any conspiratorial agreement actually became vitiated when it was discovered that the subject property was not property of the estate (see Sec. 2 *infra*), so that the completion date found by the trial court is actually later than the true completion date.

Since it would be plain error in light of *United States v. Rabinowich, supra,* and other applicable authorities to apply § 3284 when Congress has not expressly made it applicable to conspiracy, the court of appeals in the present case rejected the government's contention and took an even more novel approach, which actually amounts to the creation of a new statute of limitations from the penumbras somewhere between § 3282 and § 3284. The result is that the § 3282 five-year limitations period cannot begin to run until the § 3284 period begins to run.[11]

The court of appeals bases its analysis on the proposition that the statute of limitations for conspiracy should not be allowed to expire before that which is applicable to the substantive crime. The court of appeals' opinion contains such a hypothetical, but one can just as easily develop a hypothetical under which the statute for the substantive crime would begin to run before the statute applicable to a conspiracy. In this regard, the court of appeals ignored (did not even cite) decisions from this Court which provide a guide for interpreting the statute of limitations. This Court has stated, so many times that no citation is needed, that if a deficiency, such as the court of appeals seemed to be concerned about, in a statute does exist, it should be corrected by Congress, *not* by a judicial fiat. In dealing with statute of limitations questions in particular this Court has repeatedly stated that a statute of limitations is to be interpreted liberally in

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[11] There is no contention by the government in this case that an overt act which furthered the conspiracy actually occurred less than five years prior to the indictment or that concealment of the conspiracy was an object thereof.

favor of repose. *Cf. United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed. 2d 468, 480 (1971). What the court of appeals did in the present case is clearly the exact opposite. As to the commencement of the statute of limitations for conspiracy, this Court's decisions warn that the Court will look with disfavor on interpretations which "broaden the already pervasive and wide sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404, 1 L.Ed. 2d 931, 944, 77 S.Ct. 963 (1957).[12]

As in *Grunewald*, it is well established that the running of the statute of limitations for conspiracy begins when the object of the conspiracy is accomplished and that at least one overt act in furtherance thereof occurred within the limitations period. *Id.* 1 L.Ed. 2d at 939-943; *see also*, 68 ALR Fed. 628, 643 and cases therein cited.

The court of appeals declined the opportunity to undo the damage its interpretation would do when it denied Fleming's petition for rehearing, which was based upon withdrawal as an alternative trigger date for the statute of limitations. Fleming pointed out that even if the statute of limitations did not commence on the June 4, 1991 completion date, there was clear, uncontroverted evidence of his withdrawal after that date but still more than five years prior to the indictment. *See* App. 53-60 This Court and other courts of appeals have uniformly held that withdrawal commences the limitations period, even though it has not expired as to other conspirators or

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[12] What makes this case even more offensive to the teaching of *Grunewald* is that Fleming, unlike the defendant in *Dolan*, could not be charged with the substantive crime. *See, Sec. 2, infra.*

the conspiracy. *Cf., Hyde & Sneider v. United States*, 225 U.S. 347, 56 L.Ed. 1114, 32 S.Ct. 793 (1912). Even though the court of appeals did not provide a reason for its denial of Fleming's petition for rehearing, it must be assumed that the court of appeals has decided that nothing short of the circumstances set forth in § 3284 will commence the § 3282 limitations period for a conspiracy to conceal assets in bankruptcy. Thus, the court of appeals' interpretation of § 3282 in this context has effectively swept away two long-standing rules regarding the commencement of the limitations period in one fell swoop.

To achieve the desired result, the court of appeals has in this case done Justice Douglas one better.[13] While it may be permissible to utilize constitutional penumbras when great social issues are at stake, this Court's precedent permits no such analysis when it comes to interpreting a statute so as to diminish the rights of citizens accused of a crime, particularly the right of repose established by a statute of limitations.

2. THE COURT OF APPEALS AFFIRMED CONVICTION AND PUNISHMENT FOR CONSPIRACY WHEN THE GOVERNMENT COULD NEITHER ALLEGE NOR PROVE AN ELEMENT OF THE SUBSTANTIVE OFFENSE.

To justify its decision, the court of appeals' opinion characterizes Fleming's argument on appeal as one of

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[13] Right of privacy found in the penumbras of the constitution. *Griswold v. Connecticut*, 381 U.S. 479, 483, 14 L.Ed. 2d 510, 514, 85 S.Ct. 1678 (1965).

"legal impossibility" and relies upon a line of cases which disavow that concept. In this regard, the court of appeals apparently misunderstood Fleming's argument.[14] Fleming's argument has nothing to do with legal impossibility. Rather, his position is that he cannot be convicted for violation of 18 U.S.C. § 371, unless what he agreed (conspired) to do would constitute a federal crime. Fleming could rely upon the language of § 371 which says as much. However, he also cited to the court of appeals and relied upon *Lubin v. United States*, 313 F.2d 419 (9th Cir. 1963). The portion of *Lubin* relied upon by Fleming holds that: "We do not think that Congress, in inacting the conspiracy statute, intended to make criminal schemes which, if successfully carried out, would not result in the commission of a federal substantive offense." (Citations omitted). *Id.* at 422. In *Lubin*, the defendant conspired to rob an armored car, but the car did not carry currency of a federally insured bank. The court of appeals attempted to distinguish *Lubin v. United States*, by stating that the defendant there did not know where the money came from. App. 19 Fleming found no such finding in the *Lubin* opinion. Regardless, the *Lubin* court stated: "[i]t would seem that a scheme to take money, if it is not bank money, is not enough, even if the defendants have mistakenly

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[14] Fleming pointed this out to the court of appeals in his petition for *en banc* rehearing. Fleming also pointed out that the decisions of the court of appeals on this point are not consistent. *Compra, United States v. Calderon*, 169 F.3d 718 (11th Cir. 1999). Without citing this Court's decision in *Parr v. United States*, 363 U.S. 370, 393, 4 L.Ed. 2d 1277, 1292, 80 S.Ct. 1171 (1960), the *Calderon* panel used the same straight-forward analysis to reach the same result.

believed that it was or might be bank money." *Lubin* at 422. Fleming could also have relied upon this Court's decision in *Parr v. United States, supra* (absence of an element of mail fraud precludes conspiracy conviction), inasmuch as "property of the estate" is an element of the substantive offense under 18 U.S.C. § 152.

The government conceded in the present case that what the government alleged Fleming and Yost conspired to do could not have resulted in the commission of a federal substantive offense and that this is the reason no substantive offense was charged in the indictment.

The court of appeals accused Fleming of a complete lack of candor when he failed to inform the court that *Lubin v. United States,* had been overruled. App. 19, FN 3 Fleming did not so inform the court because it simply is not true. While another panel of the Ninth Circuit did purport to overrule a portion of *Lubin*'s holding in *United States v. Valles-Valencia,* 823 F.2d 381 (9th Cir. 1987), the portion of *Lubin*'s holding on which Fleming relied has been reaffirmed in *United States v. Manarite,* 33 F.3d 1407, 1414 (9th Cir. 1995). As the same court of appeals, relying upon *Lubin* points out, when the object alleged is legally insufficient to be a federal offense, there can be no violation of § 371. *Id.*

Despite the above-quoted language contained in *Lubin v. United States,* the court of appeals' opinion here attempts to distinguish the present case from *Lubin* and make this a legal impossibility case, by relying upon what it believes must have been the bad intent of Fleming. *See, also,* footnote 5, *supra* at p. 7. In this regard, the court of appeals' decision comes into conflict with the decision of

yet another court of appeals. In *United States v. Edgar*, 971 F.2d 89, 94 (8th Cir. 1992), the court held that as a matter of law the defendant could not have intended to violate 18 U.S.C. § 152 when the property concealed was not property of the bankruptcy estate.[15] No mention of *Edgar* is made in the court of appeals' opinion in this case. *See also Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed. 2d 352 (1997) (a conspirator must intend to further an endeavor which, if completed, would satisfy *all* of the elements of the substantive crime).

This case represents an even more pernicious use of "the already pervasive and wide sweeping nets of conspiracy prosecutions" than the scenario this Court warned against in *Grunewald v. United States, supra*. Here the government admittedly cannot allege or much less prove an element of the substantive offense but is allowed to sustain a conspiracy conviction, based solely on circumstantial evidence,[16] due to the defendant's perceived intent. The court of appeals apparently perceived that the conspiratorial agreement occurred when Yost approached Fleming about the sale and that Fleming's filing of the notice of sale before he learned that the subject property was not estate property provides the necessary overt act. *See*, App. 17 What the court does not

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[15] Edgar was an attorney convicted of both substantive bankruptcy fraud and conspiracy. He appealed only his sentence. Fleming also appealed his sentence due to a five point increase for the "intended harm." The court of appeals did not directly address this issue.

[16] Even though Yost testified as a government witness, he did not testify that he and Fleming agreed to conceal property, nor is there any other direct evidence of such an agreement.

explain is how the filing of a nugatory notice as to nonestate property can be said to have furthered the object of the alleged conspiracy.[17] The egregiousness of the result in this case is exemplified by the trial court's order that Fleming pay $50,000.00 in restitution to the bankruptcy estate, which $50,000.00 the creditors of the estate, as the *Edgar* court points out, were never entitled to receive. It is essential that this Court announce anew its disfavor of this type of prosecution.

3. PETITIONER SHOULD RECEIVE A NEW TRIAL DUE TO THE LACK OF A MATERIALITY INSTRUCTION AS REQUIRED BY THE SUPREME COURT'S DECISION IN *NEDER V. UNITED STATES.*

Due to the timing of this Court's decision in *Neder v. United States*, ___ U.S. ___, 144 L.Ed. 2d 35, 119 S.Ct. 1827 (1999) Fleming had to make this argument for the first time in his petition for rehearing. The court of appeals chose to ignore *Neder* even though there is no doubt that it is the type of decision which should be applied "retroactively" to cases pending on direct appeal. *See, United States v. Lance*, 848 F.2d 1497 (10th Cir. 1988); *see, also Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137

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[17] Fleming never contended he knew that Matamoros was joint property when the attempt was made to transfer it to MRA, but the court of appeals mentions this as an alternative fraud. Likewise, it is uncontroverted that the title company disclosed the joint ownership before closing, and Fleming knew at that point that it was not estate property. At this point, the court of appeals' discussion completely loses touch with the record.

L.Ed. 2d 718, 727 (1997), and *United States v. James*, 528 F.2d 999 (5th Cir. 1976).

As Fleming pointed out in his petition for rehearing, the trial court gave no instruction to the jury as to the materiality element of bank fraud (jury convicted Fleming of substantive offense, trial court dismissed) or as to the materiality element of the underlying substantive offense for conspiracy to commit bankruptcy fraud.[18] *See*, App. 61-65 This court's *Neder* decision deals with bank fraud specifically, and bankruptcy fraud was not involved in that case. Even so, 18 U.S.C. § 152 makes it a crime to "knowingly and fraudulently" conceal property of a bankruptcy estate. Thus, the court of appeals could not have been in doubt that this Court's holding and analysis in *Neder* applies to bankruptcy fraud prosecutions. Materiality has been held to be a requirement for denial of a discharge under a similar section of the Bankruptcy Act. *See In re: Steiker*, 380 F.2d 765 (2d Cir. 1967). It likewise cannot be disputed that no instruction that complies with *Neder* was given in this case. In fact, the instruction given by the trial court as to the term "fraudulently" would serve to direct the jury away from the materiality element. App. 64

The problem for Fleming was exacerbated by the fact that the trial court also allowed the substantive bank fraud counts to go to the jury, which convicted Fleming, without any materiality instruction. Thus, the so-called jury findings relied upon by the court of appeals included

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[18] The trial court correctly stated, and the government agreed, that it is necessary to properly instruct the jury as to the substantive offense which the defendant conspires to commit.

allegations from the indictment that were material only to the charges of bank fraud, and the jury's deliberations were most assuredly tainted across the board without materiality instructions as to either bank fraud or bankruptcy fraud.

The majority opinion in *Neder* allowed for the possibility of harmless error and remanded the case to the court of appeals for further consideration. Denying Fleming's petition for rehearing without comment, the court of appeals made no such analysis, neither has the trial court had an opportunity to consider whether a new trial is warranted in light of *Neder*. This Court may, therefore, prefer to exercise its jurisdiction under 28 U.S.C. § 1651(a) and/or 28 U.S.C. § 2241(a)[19] in order to remand the case to the district court for appropriate consideration and findings.

4. CONCLUSION

There is no doubt that this Court has jurisdiction here should the court choose to exercise it. The decision of the court of appeals clearly conflicts with prior decisions of this Court and of other courts of appeals. Moreover, selective interpretation and application of the law to achieve a result is perhaps the most dangerous form of departure in a society governed by law. As to the question of importance, it is true that, at the end of the day, only one life and one career will suffer ruin should this

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[19] Fleming is technically "in custody" for purposes of § 2241(a). *See Hensley v. Municipal Court*, 411 U.S. 345, 36 L.Ed. 2d 294, 93 S.Ct. 1571 (1973).

petition be denied. Perhaps, however, it is sufficiently important to review and reinforce at this time this Court's long-standing policy which disfavors interpretations that will broaden the already pervasive and wide sweeping nets of conspiracy prosecutions. Perhaps the need to explain to the lower courts that this Court expects its decision in *Neder v. United States*, to be applied in all cases in which fraud is an element of the crime charged is sufficiently important. Your petitioner recognizes that the question of importance is ultimately within this court's discretion to decide. Needless to say, Petitioner feels that his last chance to receive justice in this case depends on how this Court exercises that discretion.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2467

D.C. Docket No. 97-84-CR-T-25C

(Aug. 23, 1999)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID L. FLEMING,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(August 23, 1999)

Before EDMONDSON and BLACK, Circuit Judges, and PAUL*, Senior District Judge.

PER CURIAM:

I. INTRODUCTION:

David Fleming appeals his conviction by jury verdict for conspiracy to commit bankruptcy fraud. He raises a

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*Honorable Maurice M. Paul, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

number of overlapping procedural and substantive issues in this appeal, ten to be precise. However, he discusses these various issues in the context of four arguments. The government has correctly identified the two major themes of the entire appeal. First, Fleming asserts that, as a matter of law, he cannot be held criminally responsible for a conspiracy to commit a crime if he could not have ever actually committed the substantive crime identified as the object of the conspiracy. Second, Fleming asserts that he was denied a fair trial because of compelling prejudice created by both erroneous district court rulings and prosecutorial misconduct. Each of the ten specific issues asserted by Fleming are presented below, but only the first, third, and fifth issues will be discussed in detail, *infra*.

II. ISSUES ON APPEAL:

(1) Whether the district court erred in denying Fleming's motion to dismiss based upon the alleged expiration of the statute of limitations?

(2) Whether the district court erred in denying Fleming's motion to dismiss based upon the allegedly defective indictment?

(3) Whether Count One of the indictment was sufficient to charge Fleming with a crime and inform him of the crime alleged therein?

(4) Whether the evidence was sufficient to support Fleming's conviction for conspiracy to commit bankruptcy fraud by

concealing assets as alleged in Count One of the indictment?

(5) Whether Fleming could be convicted of conspiracy to commit bankruptcy fraud where it would be impossible for him to commit the substantive crime which is the object of the alleged conspiracy?

(6) Whether the district court erred in denying Fleming's motion for severance under Rule 14 of the Federal Rules of Criminal Procedure?

(7) Whether the district court erred in permitting the government to introduce evidence of other alleged crimes and other matters which were allegedly irrelevant and immaterial?

(8) Whether the district court erred in denying Fleming's Rule 29(a) motion for judgment of acquittal prior to jury deliberations?

(9) Whether Fleming is entitled to reversal of his convictions due to the government's use of testimony from cooperating witnesses?

(10) Whether the district court properly applied and followed the sentencing guidelines?

III. PROCEDURAL HISTORY:

David L. Fleming and his co-defendants, Wallace C. Yost and Stephen P. Oppenheim, were charged in an indictment as follows:

Count I	Conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud in violation of 18 U.S.C. § 371 (all three defendants);
Count II	Substantive bank fraud in violation of 18 U.S.C. §§ 1344, and 2 (all three defendants);
Count III	Substantive bank fraud in violation of 18 U.S.C. §§ 1344, and 2 (all three defendants); and
Count IV	Mail fraud in violation of 18 U.S.C. §§ 1341, and 2 (Defendant Yost).

Yost pleaded guilty on the eve of trial to Counts I and IV, and on November 25, 1997, Fleming went to trial with co-defendant Oppenheim. The district judge granted Oppenheim's motion for judgment of acquittal at the close of all of the evidence, and Fleming was found guilty of Counts I, II, and III by the jury. After the jury returned its guilty verdict as to Defendant Fleming, he renewed his motion for judgment of acquittal and moved for a new trial. The district judge granted the motion for judgment of acquittal as to Counts II and III, and as to the bank fraud objective of the conspiracy count, but he denied the motion as it related to the remainder of the conspiracy count. The judge also denied Fleming's motion for a new trial.

At Fleming's sentencing hearing, the district judge found that Fleming's conviction for conspiracy was barred by the applicable statute of limitations as to the mail fraud, wire fraud, and money laundering objectives of the conspiracy count. He then entered a judgment of

guilty and sentenced Fleming as to the portion of Count One pertaining to conspiracy to commit bankruptcy fraud, the only charge and conviction remaining.

IV. FACTS:

As the Appellant has challenged the sufficiency of the evidence to support his conviction, this Court must view the facts and must construe all reasonable factual inferences and credibility determinations in the light most favorable to the verdict. *See United States v. Gonzalez*, 945 F.2d 1413 (11th Cir. 1991). In so doing, this Court summarizes the relevant facts as follows:

Wallace C. Yost (hereinafter "Yost" or "Mr. Yost") was a wealthy developer and businessman in the Pensacola, Florida area during the latter part of the 1980's. He owned a number of properties in both his own name and in the name of his corporate counter-part Mariner Realty Associates ("MRA"). In the latter part of 1989, Yost employed Appellant Fleming as his attorney for business and litigation matters. Through this employment, Fleming became knowledgeable regarding Yost's involvement and activities with respect to his various businesses.

Beginning in 1989 and continuing through 1981 [sic], Yost became increasingly unable to meet his financial obligations as they came due. And as a result, several banks initiated the process of liquidating the security which they had for loans made to Mr. Yost. Two of these banks, AmSouth and Citizens and Builders of Pensacola, initiated foreclosure actions against Mr. Yost, and Appellant represented him therein. By the summer of 1989, these two banks were in the position to obtain final

judgments of foreclosure, however with respect to Citizens and Builders Bank, Appellant was able to broker an arrangement whereby the bank would forbear any further litigation for ninety days for the stated purpose of allowing Mr. Yost an opportunity to secure financing elsewhere. Instead, Appellant suggested that, and Mr. Yost did then, use the ninety-day grace period to transfer the title of various assets from Yost to the various Yost businesses which would then file for bankruptcy. Appellant prepared all of the deeds of conveyance to the business, and he did also file all of the corporate bankruptcy papers. The title transfers all occurred on the same day as the filing of the bankruptcy papers.

One of the properties which Yost and Appellant attempted to transfer to one of Yost's corporations, MRA, was a house on Pensacola Beach, located at 112 Matamoros Drive (the Matamoros property). At the time of the attempted transfer, that property was owned by Mr. Yost and his wife as a Tenancy by the Entirety. Appellant was aware of this fact, though he now claims no evidence established such knowledge.

Once the bankruptcy actions had been filed, Appellant sought to delay any further proceedings against Yost and any further foreclosure proceedings by seeking a transfer of the foreclosure cases to the Bankruptcy Court. He also sought an injunction in the Bankruptcy Court which would prevent creditors of the Yosts from seeking any discovery in the bankruptcy case. Appellant then became aware that Mr. Yost was selling personal assets for cash. Thereafter, Appellant ceased his representation of the Yosts personally, but he continued to represent the

Yost corporations, working exclusively on bankruptcy matters.

At a January, 1990 hearing on a bank creditor's motion to determine whether Yost was concealing assets, Appellant represented that Yost had not concealed any assets and that the assets complained about by the bank were still in existence. Appellant and Yost had discussions about what to do with personal assets, and Appellant advised Yost that he should "move out of the country." R7-34-35. Thereafter, Mr. Yost removed the assets in question from the Pensacola area and sold them at an auction house in Atlanta without accounting for the funds received as proceeds therefrom to the Bankruptcy Court.

After Appellant's motion for an injunction prohibiting discovery by the Yosts' creditors was denied, in June of 1990, Mr. Yost and his wife were both deposed by the Citizens and Builders Bank. Both Yosts lied in their depositions regarding the existence and location of their personal assets, knowing all the while that they had removed and sold such assets. Throughout this entire period, Appellant and Mr. Yost continued to represent that the Matamoros property was part of the estate of MRA. Additionally, the Matamoros property was subject to both a first and second lien.

In the early part of 1991, Yost attempted to sell the Matamoros property to a private party, the Dancaecus'. After reaching an agreement with the Dancaecus' whereby they would pay $250,000 cash for the house, Yost discussed with Appellant how to get some of the money out of the sale of that property without it going to

the bankruptcy estate. Appellant informed Yost that if certain property was identified as "personal property" then it would not have to go through the bankruptcy estate, and it would not have to be reported to the Bankruptcy Court (i.e., the sale would be bifurcated into a real property transaction and a separate personal property transaction). Appellant instructed Yost to prepare a list of personal property. And when the first list was insufficient, Appellant instructed Yost to make a more detailed and extensive list with an increased value. The final list indicated that personal property with a value of $50,000 would be part of the overall sale to the Dancaecus'.

Appellant arranged for another attorney to handle the "personal property" sale, but he retained the $50,000 in his escrow account. The "real estate" portion of the sale was handled by a title company retained by Appellant (Lawyers cooperative Title Company), and he was to obtain approval for the sale from the Bankruptcy Court. He filed a notice of intent to sell with the Bankruptcy Court, but he left out any details of the $50,000 side agreement for "personal property."

Appellant insured that the first lien holder on the Matamoros property would accept less than the full amount due, and he also handled the concerns of the second lien holder. The title company was the first one to discover that in fact the Matamoros property was held by the Yosts as a Tenancy by the Entirety, but it was still able to close the sale once it had been assured that the Yosts' creditor thereupon had released the property from its judgment against the Yosts.

After the closing on both the real property and personal property transactions, Appellant received a $5,000

fee from the sale of the house, and an additional $11,000[1] from the personal property transaction. However, in a subsequent deposition by the bankruptcy trustee to determine how much money Appellant had received from Yost in relation to the bankruptcy matters, Appellant stated that he received less than $10,000 and that amount had been paid prior to December, 1989. He failed to disclose any of the funds received from the Matamoros real and personal property transactions.

The parties concede that the MRA bankruptcy matter was closed by the Bankruptcy Court within five years of the filing of the indictment in this case, and that the same was never converted to a Chapter 7 proceeding. Additionally, the parties do not dispute that no order recognizing the discharge or the non-dischargeability of the entity was ever entered by the Bankruptcy Court.

VII. DISCUSSION:

As noted above, only the Appellant's first, third and fifth issues on appeal will be discussed in any detail. The remaining issues will be addressed summarily below.

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[1] Fleming claims that Yost had told him that the $50,000 of proceeds from the personal property sale, which he agreed to hold in escrow, would be used to pay MRA's taxes. When Fleming learned that Yost was not intending to use the proceeds for that purpose, he refused to release them to the Yosts until he had been paid for pre-bankruptcy legal work he had performed on their behalf. Once he deducted the $11,750 he claimed was owing, he disbursed the remaining escrow funds to the Yost, and he claims that he had no knowledge of the disposition of those proceeds.

ISSUE ONE: Whether the district court erred in denying Fleming's motion to dismiss based upon the alleged expiration of the statute of limitations?

Standard of review: the district judge's legal conclusion as to the applicability of the statute of limitations is subject to *de novo* review, while his factual findings related thereto are reviewed for *clear error*. *See United States v. Gilbert*, 136 F.3d 1451 (11th Cir. 1998).

Fleming argues that the statute of limitations applicable to the charge of conspiracy to commit bankruptcy fraud is found at 18 U.S.C. § 3282, and that it runs five years from the last overt act committed in furtherance of the conspiracy. He argues that it was undisputed that the object of the conspiracy in this case was the concealment of the proceeds from the sale of the Matamoros property, and this object was accomplished on June 4, 1991, the day the proceeds were distributed.

The government's argument is brief. It contends that the district judge properly held that 18 U.S.C. § 3284 provides the applicable statute of limitations in this case, because under that section, the crime charged was a continuing crime for which the statute of limitations would not begin running until the final bankruptcy discharge or denial of the discharge. The government argues that in this case, the statute of limitations for the substantive object crime of concealment could not begin running until the earliest date the concealment could have been

completed, that is, at discharge or denial of discharge. It further argues that no conspiracy to violate the substantive crime of concealment could be completed until at least the time that the continuing substantive object crime was completed, that is, at discharge or denial of discharge.[2] The government relies upon the inference in § 3284 that the concealment of assets in a bankruptcy matter is not "completed" until the debtor receives a discharge or is denied one. It also relies on *United States v. Gilbert*, 136 F.3d 1451 (11th Cir. 1998), which held that the continuing crime of concealment is only "completed" upon action by the debtor showing a waiver of the debtor's right to discharge. In the case *sub judice*, the government argues that the earliest date from which the statute of limitations could have begun running was the closing date of the Chapter 11 bankruptcy case involving MRA, which date all parties agree would place the indictment within the five-year statute of limitations.

Fleming responds that § 3284 addresses only the substantive crime of asset concealment in a Title 11 case, whereas he was charged only with conspiracy and not the substantive offense of concealment. He asserts that the

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[2] In its response to Fleming's motion to dismiss on this point the government argued:

> . . . there exists a specific bankruptcy statute of limitations with respect to concealment of assets in a bankruptcy, 18 U.S.C. § 3284. Even a cursory reading of the statute demonstrates that the statute of limitations has not run on the substantive crime of bankruptcy fraud. Therefore, the statute could not have expired as it relates to the on-going conspiracy. . . .

conspiracy with which he was charged was independent of the substantive object offense, and that it had its own statute of limitations governed by § 3282. It is Fleming's contention that, had there been a conspiracy to conceal bankruptcy assets, that conspiracy ended on June 4, 1991, when the proceeds from the object of the conspiracy (the misapplication of proceeds from the Matamoros property) were disbursed. He notes that it was undisputed that the only activity used to support the conspiracy to commit bankruptcy fraud charge was the Matamoros sale.

The government conceded that ultimately, Fleming was not guilty of concealing assets substantively, and that no basis for a substantive bankruptcy fraud count existed. However, it noted that he could still be found guilty of conspiring to commit bankruptcy fraud if he had the intent to commit bankruptcy fraud or to conspire with Yost to do so.

Fleming relies upon three cases to support his position. First he cites to *United States v. Rabinowich*, 238 U.S. 78, 35 S.Ct. 682 (1915), in which the Supreme Court clarified that a conspiracy to commit a crime is a different offense than the crime which is the object of the conspiracy. He goes on to note that the Supreme Court concluded that a conspiracy to commit an offense made illegal by the Bankruptcy Act is not itself a crime arising under that act.

He next relies on *Carter v. United States*, 19 F.2d 431 (8th Cir. 1927) which followed the *Rabinowich* decision. In that case, the Eighth Circuit held that the general statute of limitations for conspiracies applied to a conspiracy to

violate Section 29(d) of the Bankruptcy Act charge, and not the statute of limitations provided in Section 29(d) of the Bankruptcy Act. He also relies on *United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976) (five-year limitations in § 3282 controls for conspiracy in the context of conspiracy to make false statements and misrepresentations to the Department of Labor, Manpower Administration). None of these cases address the applicable conspiracy statute of limitations when the object crime is concealment of assets from the creditors of a bankruptcy estate, which crime is defined as a continuing crime under § 3284.

Finally, Fleming relies on a case which is strikingly similar to this one, *United States v. Dolan*, 120 F.3d 856 (8th Cir. 1997). In *Dolan* the defendant was convicted of conspiracy to conceal bankruptcy property and of the substantive crime of concealment. In holding that § 3282 is the applicable statute of limitations for a conspiracy to commit bankruptcy fraud case, the *Dolan* court stated:

> The statute of limitations applicable to Count I of the indictment provides that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282. In a conspiracy charge, the limitations period begins to run from the occurrence of the last overt act committed in furtherance of the conspiracy that is set forth in the indictment. *Dolan*, 120 F.3d at 864.

However, aside from being non-binding on this panel, the *Dolan* court did not undertake an analysis of

whether § 3284, defining the substantive object offense as being a continuing offense, alters the determination of the applicable statute of limitations for a charge of conspiracy to commit bankruptcy fraud by concealment of assets.

Thus, the issue before us boils down to whether the conspiracy to commit a continuing offense is *itself* a continuing offense, such that the statute of limitations therefor would not begin running until the last day that the object crime could have been completed. We hold that the better reasoned approach is to say that a conspiracy to conceal assets, with the objective offense being defined by § 3284, is itself a continuing violation for which the five-year statute of limitations period set forth in § 3282 does not begin to run until either the discharge of the bankruptcy or the denial of discharge, or in situations where neither of those two alternatives is available, at the closing of the bankruptcy case file.

This point can best be illustrated with the following example: Suppose two individuals conspire to, and actually do conceal an asset from a bankruptcy estate on day one (the overt act), but they don't do anything else for six years. And suppose that in year six, the Bankruptcy Court discharges the bankruptcy. If the statute of limitations for conspiracy is governed by § 3282, and extends for only five years from the date of the last overt act, then the conspiracy in this hypothetical would be barred by the statute of limitations at the end of year five. But a charge for the substantive offense of concealment would survive by virtue of § 3284 which states that the statute of limitations for concealment in a bankruptcy case does not begin to run until the date of either discharge or the denial of discharge. This scenario would allow these two

individuals to avoid their criminal responsibility for conspiring to accomplish an unlawful act, but still be subject to prosecution for the object of the conspiracy.

The better rationale is to treat each day following the concealment of the asset as a continuation of that last overt act. Indeed, § 3284 recognized this rationale by concluding that the five-year statute of limitations cannot start running until the day either discharge or denial, or closing of the bankruptcy file is accomplished without the concealment having been discovered. The effect of § 3284 is to construe the last day of concealment before discharge as the last overt act of concealment, and thus, it can be reasoned in the conspiracy context that the last day before discharge should also be construed as the last overt act in furtherance of the conspiracy to conceal assets from a bankruptcy estate. This approach reconciles the arguments advanced by both parties herein by treating the last overt act as being, not the day the asset was hidden, but the last day it remained hidden before discharge. Thus, the two statutes of limitations argued by Fleming and the government are not mutually exclusive, but instead are reconcilable with one another. In other words, its not "either or" – its "both."

Based upon the foregoing, we conclude that the statute of limitations had not expired on Count One for conspiracy to commit bankruptcy fraud by means of concealing assets.

ISSUES THREE and FIVE:

Whether Count One of the indictment was sufficient to charge Fleming with a crime and inform him of the crime alleged therein?

Whether Fleming could be convicted of conspiracy to commit bankruptcy fraud where it would be impossible for him to commit the substantive crime which is the object of the alleged conspiracy?

Standard of Review: the issues of whether an indictment charges conduct which constitutes a criminal offense (issues three and five) are subject to *de novo* review. *See United States v. Lawson*, 809 F.2d 1514, 1517 (11th Cir. 1987).

Fleming's third and fifth issues revolve around his argument that he could not be found guilty of the *conspiracy* to commit bankruptcy fraud charge because he could not have committed the substantive object offense of concealing bankruptcy estate assets (since the Matamoros property, as a tenancy by the entirety, could never have been property of the bankruptcy estate from which sales proceeds could be concealed). According to Fleming, the substantive offense which served as the object for the conspiracy count (concealing bankruptcy estate assets) was impossible to commit, and he knew that it was impossible for him to commit it, so he could never have the requisite intent.

In support of this position, Fleming asserts in his brief that "Mr. Fleming, Mr. Yost, and all other parties involved in the transaction knew prior to the closing that

title to the Matamoros property was held as a tenancy by the entirety and was, therefore, not property of the bankruptcy estate." *Blue Brief*, at p.25. As a result, he argues that it was not even necessary to obtain Bankruptcy Court approval to sell the property, and he asserts that "[t]he notice of sale filed by Mr. Fleming was, therefore, insignificant." *Id.* But, why then did Fleming file a notice with the Bankruptcy Court if he was so certain that the property was not part of the estate? It was the title company which discovered that the Matamoros property was held by the entireties, not Fleming or any other party. Furthermore, Fleming's own brief flatly contradicts itself. At page seven of his Brief, Fleming states "[t]here was no evidence that Mr. Fleming knew when he prepared the deed that the title to 112 Matamoros was actually held in the name of Wallace Yost and his wife, Sara C. 'Chris' Yost, as tenants by the entireties." He can't have it both ways. Either he knew at the time he prepared the deed from Yost to MRA that the property was a tenancy by the entireties, in which case fraud arises from trying to move the property into the bankruptcy estate of MRA. Or, he did not ever know that the property was a tenancy by the entireties, in which case fraud arguably arises from the failure to disclose to the Bankruptcy Court the $50,000 side deal resulting from its sale.

Additionally, the government properly notes that Fleming has overlooked the well-established principle of law that conspiracy to commit a crime, and the object crime, are two separate crimes. The crime of conspiracy occurs when two or more co-conspirators form the intent to commit a substantive crime, join together with that requisite intent, and thereafter take any step or overt act

in furtherance of the conspiracy. *See United States v. Petit*, 841 F.2d 1546, 1549 (11th Cir. 1988). The conspiracy is separate from the underlying substantive object crime, and a defendant may be convicted of conspiracy without a finding of guilt on the underlying crime since the object of the crime of conspiracy is to punish the effort, not the result. *See United States v. Griffin*, 699 F.2d 1102 (11th Cir. 1983). Thus, even where as here, it would be legally impossible for the defendant to commit the substantive crime of concealment of assets in a bankruptcy case, he could still be found criminally liable for an effort to do so (conspiracy) if he had the requisite intent to commit bankruptcy fraud and participated with another or others, at least one of whom, took some step or performed some overt act toward that crime. *See, e.g., United States v. Shively*, 715 F.2d 260, 267 (7th Cir. 1983) (defendants believed they were going to defraud a federally insured financial institution). In Fleming's case, his preparation of the deed to MRA on the day it filed bankruptcy and his representations to the Bankruptcy Court that the Matamoros property was part of the MRA estate, coupled with all of his actions consistent with that assertion (notice of the sale to the Bankruptcy Court), constitute more than sufficient evidence to support a conclusion that Fleming had the requisite intent to commit bankruptcy fraud by concealing from the bankruptcy estate certain proceeds from the sale of property which he placed in that estate and which he asserted belonged there.

The district judge relied on the *Shively* case in holding that Fleming could be convicted of conspiracy notwithstanding the fact that it was impossible for him to

conceal MRA bankruptcy estate assets. In his reply brief, Fleming distinguishes *Shively* and argues that his defense is not impossibility, but that the object of his conspiracy was not a federal crime. *See Lubin v. United States*, 313 F.2d 419 (9th Cir. 1963).[3] Yet the *Lubin* case is distinguishable, and this Court concludes that the object of his conspiracy, as Fleming saw it, was indeed a federal crime. In *Lubin*, the defendants had been convicted of conspiring to steal the property of banks, but their convictions were reversed because the money inside of the armored car they conspired to rob did not belong to a bank. The *Lubin* court determined that the evidence did not establish that the object of the conspiracy was to take the property of a federally-insured bank, as would be required for a federal offense. The *Lubin* defendants conspired to take money from an armored car, not knowing where the money therein had come from, and their conspiracy was only chargeable in federal court if it could be established that the funds were the property of a federally insured bank, thus making the object of the charged conspiracy a federal crime. In this case, the concealment of assets was unquestionably from the bankruptcy estate (Fleming believed the Matamoros property was part of the bankruptcy estate). And Fleming conspired to conceal assets from the bankruptcy estate – such concealment being a clear violation of federal law. Here, the object of Fleming's conspiracy (concealment of assets from the bankruptcy estate) was undoubtedly a federal crime, and any

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[3] Appellant, in a complete lack of candor to this Court, failed to indicate that the *Lubin* case, upon which he relies, has been overruled on other grounds. *See United States v. Valles-Valencia*, 823 F.2d 381 (9th Cir. 1987).

reliance on the *Lubin* decision is misplaced. Indeed, the Ninth Circuit has subsequently distinguished *Lubin* and expressly held that the doctrine of legal impossibility "is not available as a defense to a charge of conspiracy in this circuit." *United States v. Everett*, 692 F.2d 596, 599 (9th Cir. 1982). The *Everett* court quoted its prior holding in *United States v. Sanford*: " 'the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . . , and is not at all dependent upon the ultimate success or failure of the planned scheme.' " *Id.* (quoting *United States v. Sanford*, 547 F.2d 1085, 1091 (9th Cir. 1976)).

The Second Circuit has similarly held that legal impossibility cannot serve as a bar to a prosecution for conspiracy to commit a federal offense. *See United States v. Wallace*, 85 F.3d 1063 (2nd Cir. 1996). In *Wallace*, the defendant withdrew funds from Citibank believing the source of those funds to be stolen checks. The court held that a misapprehension by conspirators as to facts which would make it impossible for them to commit the object crime does not diminish their culpability for conspiracy. *See id.* at 1068 (citing *United States v. Giordani*, 693 F.2d 245, 249-50 (2nd Cir. 1982)). Important to the Second Circuit's holding was the notion that "had the facts been as Wallace believed, the withdrawal of money from Citibank would have been illegal." *Id.* More recently, the Second Circuit has stated that where an indictment charges conspiracy, "legal impossibility affords a conspirator no defense." *United States v. Trapilo*, 130 F.3d 547, 552-53 (2nd Cir. 1997). Relying on a Seventh Circuit holding, the *Trapilo* court went on to note that the impossibility of a defendant's conduct resulting in actual

consummation of a contemplated object offense is neither persuasive or controlling with respect to the conspiracy charge. *See id.* (citing *United States v. Meyers*, 529 F.2d 1033, 1037 (7th Cir. 1976)). Along with the Ninth, Second, and Seventh Circuits, the Third Circuit has also recently held that legal impossibility is not a defense to a charge of conspiracy. In so holding, the Third Circuit has stated that "it is . . . irrelevant that the commission of a substantive offense may have been legally impossible for the conspiracy to achieve all along." *United States v. Hsu*, 155 F.3d 189, 203 (3rd Cir. 1998).

Under our own Circuit precedent, it is also clear that the impossibility of achieving or accomplishing the goal of a conspiracy is irrelevant to the conspiracy crime itself. *See United States v. Petit*, 841 F.2d 1546, 1550 (11th Cir. 1988). In *Petit*, we held that although the defendants therein "could not have been convicted of the substantive offense of receiving stolen property, their convictions for conspiring to receive stolen property cannot be reversed on [that] ground." *Id.* at 1551. In that case, it was enough that the conspirators conspired to receive goods which they *believed* were stolen. *See id.* at 1550; *see also United States v. Sarro*, 742 F.2d 1286, 1297 (11th Cir. 1984), *United States v. Bobo*, 586 F.2d 355, 371 (5th Cir. 1978) (it is sufficient for a conspiracy charge that defendant thought he was buying a controlled substance and he believed that he was furthering the ends of the conspiracy by doing so).[4] Here, Fleming and Yost conspired to conceal

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[4] In *Bonner v. City of Prichard* , 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

portions of the proceeds from the sale of the Matamoros property from the MRA bankruptcy estate, believing that the property was part of that estate, and they took affirmative steps in furtherance of that conspiracy. No more is required to sustain a conviction for conspiracy. As noted above, the crime of conspiracy occurs when two or more co-conspirators form the intent to commit a substantive crime, join together with that requisite intent, and thereafter take any step or overt act in furtherance of the conspiracy. *See United States v. Petit*, 841 F.2d 1546, 1549 (11th Cir. 1988).

This Court agrees with the district court and concludes that Appellant Fleming could have been convicted of conspiracy to conceal assets from the bankruptcy estate despite the fact that it would have been impossible for him to be guilty of, and he could not have been charged with a substantive count of, actually concealing those same assets.

Each of the remaining issues raised by the Appellant have been considered by this Court under the appropriate standards, and the district court's holdings thereupon are affirmed without discussion.

For the reasons stated herein, the judgment below is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 3:97cr57/RV
(Filed March 25, 1998)

DAVID I. FLEMING,

Defendants.
_____/

ORDER

Pending is the motion of defendant David L. Fleming for judgment of acquittal and new trial. (doc. 127)

I. BACKGROUND

After a seven-day jury trial, defendant David L. Fleming was found guilty of conspiracy to commit bank fraud, bankruptcy fraud, mail fraud, wire fraud, and money laundering, in violation of Title 18, United States Code, Section 371, and was also found guilty of two counts of bank fraud, in violation of Title 18, United States Code, Section 1344.

The charges against defendant Fleming, an attorney, were based on conduct that occurred during Fleming's representation of co-defendant Wallace C. Yost, a wealthy businessman in the Pensacola area during much of the time period covered by the indictment. At trial, it was established that Yost, who owned numerous properties in

Northwest Florida, began experiencing financial difficulties in the late 1980's. By 1989, several banks, including AmSouth Bank ("AmSouth") had instituted foreclosure actions against several of Yost's properties.[1] Additionally, during 1989, Citizens and Builders Federal Savings Bank ("C&B"),[2] one of Yost's lenders, sued on the promissory mortgage note executed by Yost and his wife for a loan on one of the Yost properties. Although the note was secured by a mortgage, the action was only on the note, and was not a mortgage foreclosure. In mid-1989, AmSouth obtained three foreclosure judgments against Yost individually for a combined total of $7.5 million. Shortly thereafter, C&B obtained a personal judgment against Yost and his wife in the approximate amount of $ 2.7 million. At the time its judgment was entered, C&B stipulated with Fleming not to take action to collect on its judgment for a period of 90 days in order to give Yost an opportunity to arrange refinancing of the debt.

In the midst of this activity by Yost's creditors, Fleming had Yost transfer (by quit claim deeds) most of the real estate held in his name to a number of corporations controlled by Yost. On Fleming's advice, each of those corporations (all of which were controlled by Yost) then immediately filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Those corporations included Mariner Enterprises of Pensacola, Inc.; Mariner Realty Associates,

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[1] AmSouth was formerly known as the First Mutual Savings Association of Florida.

[2] C&B was taken over by the RTC while the litigation was pending, and C&B's assets were ultimately sold by RTC.

Inc.; Mariner Enterprises of Ft. Walton Beach, Inc.; and Mariner Enterprises of Panama City, Inc. Yost did not file for personal bankruptcy.

The automatic stay of pending litigation under Section 362 of the Bankruptcy Code applied as soon as the bankruptcy petitions were filed. As Fleming and Yost anticipated, the transfer of the real estate to the corporations and the filing of the corporate bankruptcies temporarily halted AmSouth's foreclosure efforts and C&B's attempts at collecting on its judgment. AmSouth, along with several other banks, had filed foreclosure actions in the various counties in Northwest Florida where Yost's real estate properties were located. Fleming vigorously opposed the creditors' efforts to get the automatic stay lifted, with the result being that the foreclosures were essentially blocked for several critical months.

At the time the corporations filed for bankruptcy, Yost had substantial personal assets, including paintings, extensive rock and roll musicians' memorabilia, antique clocks and furniture, and other collectibles. The collectibles and their value were included in Yost's 1987 financial statements which reflected a net worth of approximately $31 million and which were used by Yost for the purpose of obtaining loans. On the basis of the information contained in those financial statements, C&B took the deposition of Yost and his wife in July of 1990 in an attempt to find out what personal assets were then available to satisfy the amount owed to C&B.[3] Yost and

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[3] Fleming did not represent either Yost or his wife for purposes of the depositions.

his wife were untruthful concerning the extent and location of their personal property, and generally denied having any remaining assets. As a consequence, C&B was unable to take further action to pursue collection against Yost's personal property. When C&B and another creditor had previously sought to take collection actions against Yost personally, Fleming had sought a bankruptcy court injunction prohibiting such activity, an unusual action under such circumstances.

Beginning shortly after the filing of the corporate bankruptcies, Yost began selling his personal property collectibles through dealers located in major cities in the United States and overseas. A total of over $2 million in personal property was sold after the bankruptcy filings, with the majority of the items sold between 1990 and 1993. Fleming was aware of the value of Yost's personal assets, and of the sale of such assets during the pending corporate bankruptcy proceedings, but there was no evidence that he participated in the hiding and sale of the collectibles. Fleming testified at trial that he was told by Yost that the money received from these sales was used to pay Yost's personal bills and the bankruptcy costs of the corporations. Yost testified that when he asked Fleming what Fleming would do in his situation, Fleming said "I'd move to Lausanne."

Although Fleming represented Yost's corporations in all of the bankruptcy proceedings, Fleming stopped representing Yost personally in October 1989 except for matters still pending. After the bankruptcy filings, Yost continued to make payments to Fleming for both past and present legal fees, with the money derived from the sale of personal assets. Charles Glidewell, Assistant United

States Trustee with the United States Bankruptcy Trustee's Office, testified that Fleming was required to disclose to the bankruptcy court payments made to him by Yost for legal fees, even though those fees were for personal representation, and that Fleming did not disclose, several payments made to him by Yost during the pendency of the bankruptcy proceedings.

One of the many parcels of real estate transferred to Yost's corporations was a residence located at 112 Matamoros Drive, Pensacola Beach, Florida, which had been Yost's personal residence prior to 1988. The property was transferred to Mariner Realty Associates, Inc. at the time of all the real estate transfers in 1989; however, although the home was titled in the names of Yost and his wife, the quit claim deed transferring the property to Mariner Realty Associates was only signed by Yost.The house had been listed for sale for about a year at $295,000, but had received no offers.

After Mariner Realty Associates, Inc. filed its bankruptcy petition, Yost received an offer to purchase the home from Lucian Dancaescu. Yost testified that he was aware that any sale would have to be approved by the bankruptcy court. After negotiations with Yost, Dancaescu offered $250,000 for the house, together with all items in the house. Yost testified that Fleming advised him that the sale could be structured so that $200,000 would be used to pay off the mortgage through the procedures of the bankruptcy court, while $50,000 would go to Yost personally for the purchase of personal property in the house. A schedule of personal property was prepared, but several of the more valuable items on the list were actually affixed to the house and were not

separate personal property. The actual value of personal property in the house, according to Yost, was approximately $25,000 to $30,000. When the sale was completed, the $50,000 payment for personal property was placed into Fleming's escrow account, with $38,000 given to Yost and the rest retained by Fleming as attorney's fees. The side agreement for $50,000 was not disclosed to the bankruptcy court.

About the time that the sale of the Matamoros Drive house was finalized, Yost retained Defendant Oppenheim, a Miami attorney who specialized in trusts and asset protection. During the last half of 1991 and the early part of 1992, Yost transferred funds through Oppenheim's escrow account in transactions that are totally unrelated to Defendant Fleming.

In 1991,Yost left the north Florida area. For several years, he lived in Mexico. He continued to sell his personal assets via dealers in Europe and in, *inter alia,* New York, Chicago, Atlanta, and Los Angeles. His creditors were unable to locate Yost or his personal assets in order to collect on the judgments against him. Yost also arranged for false identities and false passports for himself.

Yost, Fleming, and a third defendant, Steven P. Oppenheim, were indicted on May 28, 1997. Count I of the indictment charged that defendants Yost, Fleming, and Oppenheim conspired to commit several offenses against the United States. In essence, the indictment alleged that Yost used the services of defendants Fleming and Oppenheim, both attorneys, to conceal the ownership and location of real and personal property from Yost's

creditors. The indictment also alleged that property was sold and the proceeds transferred with the assistance of Oppenheim and Fleming to various national and international bank accounts under Yost's direct or indirect control. The indictment further alleged that the defendants laundered the fraudulently concealed assets and proceeds through various business entities and financial institutions to disguise the ownership and control of the assets and proceeds.

Count II charged that the three defendants also committed bank fraud against AmSouth by attempting to conceal assets from AmSouth in order to frustrate AmSouth's attempts to collect from Yost. Count III charged that the three defendants committed the same offense against C&B. Finally, Count IV charged that defendant Yost committed mail fraud.

The defendants' motion to dismiss the indictment was denied. Shortly before jury selection began, defendant Yost entered a plea of guilty to Counts I and IV of the indictment. (doc. 101) The trial of defendants Fleming and Oppenheim began on November 17, 1997. At trial, I granted defendant Oppenheim a judgment of acquittal on all counts against him after the conclusion of the government's case-in-chief. At the end of the trial, the jury found defendant Fleming guilty of Counts I, II and III, and specified that Fleming was guilty of all five objects of the conspiracy charged in Count I. Defendant Fleming has moved for a post-verdict judgment of acquittal on Counts I, II, and III.

II. ANALYSIS

A. Legal Standard

Rule 29(c), Federal Rules of Criminal Procedure, provides that "[i]f the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged. . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal." The defendant timely filed this motion. In deciding a Rule 29 motion for judgment of acquittal, a district court must "determine whether, viewing all the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Grigsby*, 111 F.3d 806, 833 (11th Cir. 1997) (citation omitted). *See Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979). It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. *United States v. Hardy*, 895 F.2d 1331, 1334 (11th Cir. 1990). The inquiry is whether a reasonable factfinder, when choosing among reasonable constructions of evidence, could have found that the evidence established guilt beyond a reasonable doubt. *See, e. g., United States v. Goggin*, 853 F.2d 843, 844-45 (11th Cir. 1988); *United States v. Sanchez*, 722 F.2d 1501, 1505 (11th Cir. 1984).

B. Discussion

The defendant, contends that there is insufficient evidence upon which the jury reasonably could have found the defendant guilty beyond a reasonable doubt of the charges against him. According to the defendant, the evidence presented by the government as to the actions taken by the defendant while representing Yost fails to prove that the defendant had any criminal intent to defraud AmSouth or C&B Bank for purposes of Counts II and III. As to Count I, the defendant contends that since the government failed to prove that the defendant had the intent to commit bank fraud or bankruptcy fraud, all parts of Count I must fail. Finally, the defendant seeks an order under Rule 29(d), conditionally granting a new trial should a judgment of acquittal be granted, on the ground that the government changed its focus during the trial and made outrageous arguments to the jury.

(1) Bank Fraud

The defendant's arguments center on whether the defendant's conduct in representing Yost, as evidenced at trial, constituted bank fraud. According to the defendant, the evidence as to bank fraud established only that he, as Yost's attorney, aggressively represented Yost during bankruptcy in an attempt to allow Yost time to save his businesses and properties. Although a similar argument advanced in the defendant's motion to dismiss was unsuccessful, the defendant contends that the government failed to support the allegations in the indictment with evidence at trial.

At trial, the government relied on the first subsection of Title 18, United States Code, Section 1344, which imposes criminal penalties on "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution." Under that subsection, the government must prove that the defendant "intentionally participated in a scheme or artifice to defraud another of money or property." *United States v. Goldsmith*, 109 F.2d 714, 715 (11th Cir. 1997). Under that subsection, the government must prove specific intent to defraud. *Id.* at 716. For purposes of Section 1344, intent to defraud has been defined as "acting willfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Moede*, 48 F.3d 238, 241 (7th Cir. 1995). *See United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995). It is not necessary for the defendant to receive personal benefit to support a conviction under the statute; instead, it is sufficient that the defendant intended to cause actual or potential loss to the financial institution. *Id.*; *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996); *United States v. Hord*, 6 F.3d 276, 282 (5th Cir. 1993); *United States v. Knipp*, 963 F.2d 839, 846 (6th Cir. 1992). While the government must prove specific intent to defraud, the government is not required to establish misrepresentation on the part of the defendant for purposes of the first subsection. *United States v. Goldsmith*, 109 F.2d 714, 716 (11th Cir. 1997).

The defendant argues that the bank fraud statute does not apply to his conduct. In essence, the defendant contends that the acts he committed fall within the civil litigation exception to bank fraud established as the law

of this circuit in *United States v. Mueller*, 74 F.3d 152 (11th Cir. 1996). In *Mueller*, the defendant's acts of filing a false affidavit and answer to delay the entry of a money judgment against him were found insufficient to constitute bank fraud. *Id.* at 1159-60. As discussed in my earlier order denying the defendants' motion to dismiss the indictment, the Eleventh Circuit determined in *Mueller* that the defendant's conduct in the civil litigation did not rise to the level of fraud. In essence, the Eleventh Circuit held that in the absence of other acts that constitute criminal behavior, abuse of the civil litigation process does not rise to the level of fraudulent conduct for purposes of the bank fraud statute. *See also United States v. Campbell*, 64 F.3d 967 (5th Cir. 1995) (convictions for bank fraud and conspiracy to commit bank fraud reversed; in absence of scheme of deceit or material misrepresentation, pursuit of available legal remedies did not constitute bank fraud).

The indictment charged that defendants Fleming and Oppenheim were aware that Yost was selling personal assets to generate cash that he did not intend to use to satisfy the judgments held by C&B and AmSouth, that they intentionally allowed Yost to deposit the cash in their law firm escrow accounts, and that they otherwise followed Yost's directions in disbursing money from the accounts to Yost, his wife, and other banks and persons. At trial, however, the government presented no evidence that Fleming allowed Yost to use his law firm's escrow account as alleged in the indictment. Instead, the evidence at trial applicable to these two counts, taken in the light most favorable to the government, established that

Fleming intentionally engineered the corporate bankruptcies and real estate transfers to give Yost time to sell his personal assets before they could be attached in execution of the judgments of AmSouth and C&B, and that some of the proceeds received by Yost were used to pay legal fees owed to Fleming.

To find Fleming guilty of bank fraud, the jury was required to find that Fleming knowingly executed, or attempted to execute, a scheme or artifice to defraud a financial institution, and that the defendant acted willfully and with the specific intent to defraud that institution. The government attempted to show that Fleming went beyond pursuing legal means of asset protection on behalf of Yost, and acted with the specific intent to defraud by giving Yost time to conceal and sell personal assets to which AmSouth and C&B would otherwise have become entitled. However, the evidence at trial did not support this theory. The bankruptcies engineered by Fleming gave Yost time to hide personal assets from his creditors, including AmSouth and C&B. Fleming's actions on behalf of Yost, a client, insofar as applicable to these two banks, were within the legal parameters of the Bankruptcy Code. Fleming was certainly aware that Yost had substantial personal assets which he was attempting to sell, but the evidence at trial did not establish that Fleming took any actions outside of his role as a bankruptcy attorney in assisting Yost in protecting his assets. Both C&B and AmSouth were aware of the extent of Yost's personal assets, not only because of the financial statements submitted by Yost to these banks, but also because of general community knowledge of many of these assets. Importantly, Fleming did not represent Yost for purposes

of the 1990 deposition in which Yost and his wife misrepresented or lied about their remaining assets.

Although the evidence established that some of the proceeds from the sale of Yost's personal assets were used to pay Fleming's legal fees, and that such payments were not all properly reported to the bankruptcy court, such actions do not constitute bank fraud, but are more properly considered in the context of bankruptcy fraud. The evidence connected with bank fraud is that Fleming aggressively pursued Yost's options under the Bankruptcy Code in order to give Yost a last opportunity to try to revitalize his businesses, as well as some time to try to shelter personal assets. In the absence of a scheme to defraud, such pursuit of available legal remedies does not constitute bank fraud or conspiracy to commit bank fraud under the law of this circuit. *United States v. Mueller*, 74 F.3d 1152, 1159-60 (11th Cir. 1996); *United States v. Campbell*, 64 F.3d 967 (5th Cir. 1995). Because a reasonable factfinder could not have found that the evidence established Fleming's guilt beyond a reasonable doubt, the defendant's motion for judgment of acquittal on the two charges of bank fraud and the specific charge included in Count I of conspiracy to commit bank fraud is GRANTED.[4]

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[4] Although there was some evidence that the mortgagee of the 112 Matamoros Drive property may have been defrauded by Yost and Fleming in the negotiated payoff amount, that was not within the charged conduct.

(2) Mail and Wire Fraud

The conspiracy charged in Count I also included an allegation that the conspiracy was to commit mail fraud and wire fraud. The defendant has not directly addressed this allegation, but has instead relied upon his arguments concerning bank fraud and bankruptcy fraud.

"[C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d 1503 (1959). To establish a conspiracy to commit mail or wire fraud, "the government must prove (1) an agreement between two or more persons (2) to execute a scheme to defraud and (3) the use of either the mails or wire service in furtherance of the scheme." *United States v. Ross*, 131 F.3d 970, 980 (11th Cir. 1997). *See Belk v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989) ("The wire fraud statute tracks the language of the mail fraud statute . . . The statutes are given a similar construction and are subject to the same substantive analysis."). The government is not required to produce direct proof of scienter; circumstantial evidence of criminal intent can suffice. *United States v. Suba*, 132 F.3d 662, 673 (11th Cir. 1998); *United States v. Hawkins*, 905 F.2d 1489, 1496 (11th Cir. 1990). The government must establish only that the fraudulent scheme existed; conviction "need not rest on the success of the fraudulent scheme." *United States v. Wingate*, 997 F. 2d 1429, 1433 (11th Cir. 1993). Proof of specific intent to use the mails or wire service is not required to show conspiracy to commit mail or wire fraud. *Id.* Rather, "[t]he government's burden . . . is to

demonstrate beyond a reasonable doubt that [the defendants] agreed to engage in a scheme to defraud in which they contemplated that the mails [or wire service] would likely be used." *Id.* (quoting *United States v. Massey*, 827 F.2d 995, 1002 (5th Cir. 1987)).

The conspiracy charges of mail fraud and wire fraud against defendant Fleming necessarily rely on the evidence concerning the Matamoros Drive transaction. Evidence of the "scheme to defraud" consisted of proof at trial that Fleming knowingly participated in the sale of the Matamoros Drive property, arranged for $50,000 to go to Yost personally without disclosure to the Bankruptcy Court or the Bankruptcy Trustee, and did not disclose fees that he received as a result of the sale. The government presented evidence that defendant Fleming mailed letters and made telephone calls on Yost's behalf in arranging the Matamoros Drive transaction. The proceeds of the sale were placed in Fleming's law firm escrow account, and Yost's portion of the proceeds was transferred by wire to the escrow account of defendant Oppenheim. On the basis of this evidence, a reasonable fact-finder could find Fleming guilty beyond a reasonable doubt of conspiring to commit mail fraud and wire fraud.

(3) Bankruptcy Fraud

As the defendant notes, the government's proof as to the charge of conspiring to commit bankruptcy fraud centered on the sale of the residence at 112 Matamoros Drive, Pensacola Beach, Florida. The defendant contends that the Matamoros Drive property was never legally a part of the bankruptcy estate, and therefore the sale of it

could not be an attempt to conceal an asset from creditors. According to the defendant, since it was impossible for him to commit the substantive offense of bankruptcy fraud, he could not conspire to commit bankruptcy fraud.

The undisputed evidence at trial was that the quit claim deed conveying the property to Mariner Realty Associates, Inc. was signed only by Yost. Since the property was actually owned by both Yost and his wife as tenants by the entireties, both were required to execute the deed in order to convey any legal title to the corporation. Therefore, it is argued that the property never became part of the bankruptcy estate of the corporation. However, all the parties treated the property as a part of the bankruptcy estate. It was listed as a bankruptcy estate asset, and the bankruptcy court exercised supervision over the sale and the sales proceeds. Both Yost and Fleming considered it as a bankruptcy asset throughout. Corrective documents were eventually executed to cure the failure of the wife to sign the deed and allow the sale to close. The entire transaction was structured and handled in a manner which willfully concealed the $50,000 from the Bankruptcy Court proceeding participants, and it can reasonably be characterized as bankruptcy fraud.

Even assuming that it was impossible for Fleming to commit the substantive offense of bankruptcy fraud, impossibility is not a defense to a conspiracy charge. *United States v. Shively*, 715 F.2d 260, 267 (7th Cir. 1983) (bank fraud conspiracy conviction upheld even though bank was not federally insured, because defendants thought it was federally insured); *United States v. Robertson*, 659 F.2d 652, 657 n.2 (5th Cir. Unit A 1980); *United States v. Katz*, 601 F.2d 66, 68 (2d Cir. 1979). "A conviction

for conspiracy will stand even if the evidence is insufficient to support a conviction for the substantive offense also pled as an object of the conspiracy." *United States v. Ross*, 131 F.3d 970, 989 (11th Cir. 1997). To be complete, a conspiracy simply requires that the co-conspirators form the intent to commit a substantive crime, that the defendant knowingly and willfully joins that conspiracy, and at least one of the conspirators takes a step in preparation thereof. *United States v. Petit*, 841 F.2d 1546, 1549 (11th Cir. 1988); *United States v. Sarro*, 742 F.2d 1286 (11th Cir. 1984).

The evidence, viewed most favorable to the government as it must now be, shows that Fleming was responsible for structuring the sale of 112 Matamoros, arranged for $50,000 to go to Yost personally, and did not disclose the $50,000 payment to the bankruptcy court. While the $50,000 was supposedly given for personal property inside the residence, and the amount was inflated in excess of what even Yost felt was the true value, Fleming asked Yost to prepare a list of items inside the residence to provide support for the price, and later asked Yost to revise the list to add more items. The $50,000 was placed in Fleming's escrow account, and approximately $12,000 of the funds were paid to Fleming personally. Fleming and Yost both believed that the residence was part of the bankruptcy estate. On the basis of this evidence, a reasonable fact-finder could find that the evidence established beyond a reasonable doubt that Fleming conspired to knowingly, willfully, and fraudulently conceal the $50,000 from creditors of Mariner Realty Associates, Inc., and conceal all evidence of the payment of legal fees to Fleming from the bankruptcy trustee and bankruptcy court.

(4) Money Laundering

Count I charged the defendant with conspiring to commit the offense of money laundering under Title 18, United States Code, Section 1956(a)(1)(B)(i). That section provides criminal penalties for any person who, knowing that property involved in a financial transaction involves the proceeds of unlawful activity, conducts a financial transaction involving the proceeds, "knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." – In considering whether the requisite intent to disguise or conceal is present, courts consider a variety of types of evidence, including:

> [S]tatements by a defendant probative of intent to conceal; unusual secrecy concerning the transaction; structuring the transaction to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; and expert testimony on practices of criminals.

United States v. Contreras, 108 F.3d 1255, 1265 (10th Cir. 1997).

Bankruptcy fraud is one of the specified unlawful activities that may be used to support a charge of money laundering. *See* 18 U.S.C. § 1956(b)(7)(D). In this case, the evidence at trial was that Fleming and Yost structured the sale of 112 Matamoros so as to conceal $ 50,000 from the bankruptcy court. The $ 50,000 was placed directly in the

defendant's law firm escrow account, with approximately $38,000 of the money given to Yost and the rest kept by the defendant. Yost transferred his portion of the money to the escrow account of defendant Oppenheim's law firm.

Here, the transaction in question for purposes of money laundering is the deposit of the $50,000 into Fleming's escrow account. The inference to be drawn in favor of the government is that the money was placed in an escrow account, rather than given directly to Yost, so that Yost could conceal the illegal proceeds of the bankruptcy fraud. Supporting this inference is the fact that Yost then transferred the money to another law firm's escrow account. A reasonable trier of fact could find that the evidence established Fleming to be guilty beyond a reasonable doubt of the offense of conspiring to commit money laundering.

(5) Motion for New Trial

Defendant Fleming contends that even if the entry of a judgment of acquittal should be reversed on appeal, he is entitled to a new trial based on the government's change of focus during the trial and outrageous argument to the jury. Rule 29(d), Federal Rules of Criminal Procedure, provides that if a motion for judgment of acquittal after a verdict of guilty is granted, the court "shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination."

The defendant contends that while the government took the position before trial that the crime for which the defendant was charged involved assisting Yost in selling assets and hiding proceeds by laundering money through the defendant's escrow account, at trial the evidence went solely to the defendant's conduct in representing Yost. The defendant also contends that the government's statement during closing argument that it was the defendant's position that lawyers could lie, cheat, and steal with impunity so enraged the jury that their verdict did not reflect the evidence.

As the government notes, the defendant in his first argument appears to be arguing a material variance between the indictment and proof at trial. A conviction is not reversed on the basis of a variance unless that variance was material and substantially prejudicial to the defendant. *United States v. Calderon*, 127 F.3d 1314, 1327 (11th Cir. 1997). To demonstrate substantial prejudice, the defendant must show that the proof at trial differed so greatly from the charges that the defendant was unfairly surprised and was unable to prepare an adequate defense. *Id.; United States v. Starrett*, 55 F.3d 1525, 1553 (11th Cir. 1995). In this case, the defendant was given access before trial to the documents used by the government to prove its case, and was aware of the evidence to be presented at trial concerning the use of his escrow accounts. In addition, the defendant's actions in his capacity as Yost's attorney have been at issue in this case since the beginning. The defendant has not shown that he was unfairly surprised and unable to prepare an adequate defense.

As to the defendant's contention concerning the prosecutor's statement during closing argument, the defendant objected at trial to the prosecutor's suggestion that a theme of the defendant's argument was that attorneys were given special license to cheat and mislead. The objection was sustained, and the jury was directed not to consider the statement. For a claim of prosecutorial conduct relating to the closing argument to be successful, the "argument must be improper and prejudicial to the substantial right of the defendant." *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997). However, a curative instruction may render the prejudicial remark harmless. *Id.* "Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." *United States v. Lopez*, 898 F.2d 1505, 1511 (11th Cir. 1990). I find that the statement of the prosecutor, which was immediately followed by a curative instruction, did not prejudice the substantial rights of the defendant.

III. CONCLUSION

The defendant's motion for judgment of acquittal is GRANTED as to the charges in Count I of conspiring to commit bank fraud and the charges of bank fraud in Counts II and III. The motion is DENIED as to all remaining conspiracy charges of Count I. (doc. 127) The defendant's motion for new trial is CONDITIONALLY DENIED.

DONE AND ORDERED this 25th day of March, 1998.

/s/ Roger Vinson
ROGER VINSON
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2467-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

DAVID L. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Dec. 23, 1999)

BEFORE: EDMONDSON and BLACK, Circuit Judges, and PAUL*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, David L. Fleming, is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-40

---

* Honorable Maurice M. Paul, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2467-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID L. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Dec. 23, 1999)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____ F.2d ____).

BEFORE: EDMONDSON and BLACK, Circuit Judges, and PAUL*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Honorable Maurice M. Paul, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

Appellate Procedure, Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2467-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID L. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court
Northern District of Florida

(Filed Jan. 24, 2000)

ORDER:

* * *

The motion of appellant, David L. Fleming, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 3 March 2000, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the

above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * *

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA

v

3:97cr57-02 RV
(Filed Apr. 3, 1998)

DAVID L. FLEMING

JUDGMENT OF ACQUITTAL BY THE COURT

The Court having heard the testimony in this case and having determined that there is insufficient evidence to justify a judgment of conviction, it is upon consideration, hereby **ORDERED:**

JUDGMENT OF ACQUITTAL of the defendant as to Count I of conspiring to commit bank fraud, and as to Counts II and III of the Indictment be and is hereby entered.

DONE AND ORDERED this 25th day of March, 1998.

/s/ Roger Vinson
ROGER VINSON
Chief Judge

United States District Court

Northern District of Florida

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(For Offenses Committed On or After November 1, 1987)
DAVID L. FLEMING	Case Number: **3:97CR00057-002**
	T. Sol Johnson, Esq.
	Defendant's Attorney

THE DEFENDANT:

* * *

[X] was found guilty on count(s) **I of Indictment (11/25/97)** after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 371	**Conspiracy to Commit Bankruptcy Fraud**	**06/04/1991**	**I**

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] Count(s) I (bank fraud, mail fraud, wire fraud, money laundering) and II & III (bank fraud) are dismissed.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within

30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **267-08-7038**

Defendant's Date of Birth: **10/15/1953**

Defendant's USM No.: **04192-017**

Defendant's Residence Address:

913 Gulf Breeze Parkway, #6

Gulf Breeze **FL** **32561**

Defendant's Mailing Address:

913 Gulf Breeze Parkway, #6

Gulf Breeze **FL** **32561**

03/26/1998

Date of Imposition of Judgment

/s/ Roger Vinson

Signature of Judicial Officer

ROGER VINSON

Chief Judge

Name & Title of Judicial Officer

4/3/98

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 3:97cr57-RV

DAVID L. FLEMING and STEVEN P. OPPENHEIM,

Defendants.
_____/

TRANSCRIPT OF THIRD DAY OF TRIAL

The above-entitled matter came on to be heard before the Honorable ROGER VINSON, Chief United States District Judge, in the United States Courthouse, Pensacola, Florida, on the 20th day of November, 1997 commencing at 8:49 a.m.

* * *

[205] Q In 1991, and specifically the months of March, April, May and June, how were you employed, sir?

A I was employed by Mariner Realty Associates.

Q In what capacity, sir? Well, let me ask you this, did you have a title?

A Well, not directly, no, not an official title.

Q Who did you work for directly?

A My immediate superior?

Q Yes, sir.

A Was Mr. Yost.

* * *

[217] Q Did there come a time after – after the sale of the Matamoros property that Mr. Yost instructed you to check with the Dancaescus about the purchase of some condominiums? It would have been the fall of that year, fall of 1991?

A Yes, sir, I do recall that.

Q And do you have those notes in front of you today?

A Yes, sir, I have.

* * *

A Okay. All right. It is on November 28th, 1991, which, [218] again, is Thanksgiving day. "Per a phone discussion with WC," which is Wallace C. Yost, "regarding Sand Dollar condos: Item 1, Virginia Danceascu to purchase at price quoted with mortgage balance plus 2,000 plus or minus to Mariner Realty Associates and balance to Wally and Chris for furnishings. Issue bill of sale." And then it says, "Fleming does not have to know about this."

* * *

[219] Q Can you explain to me if – the – if you – what is the entry, DLF does not need to know mean to you?

A What does it mean to me?

Q Yes, sir.

A It means that there is something – I think the word I used previously was manipulative about this.

Q Go ahead.

A And that David may have – or Mr. Fleming may have, you know, some objection if he is advised of it.

* * *

[223] Q It is exhibit 35. Fleming Exhibit 35?

A Uh-huh.

Q That was in the same year of Matamoros and the same year of Sand Dollar, I believe, the next month?

A Yes, sir.

Q Is that one of those opportunities that Mr. Fleming reminded you were your responsibility and his was?

A Can I read this?

* * *

[224] A The letter, it's on David Fleming's letterhead, dated December 31, 1991, addressed to Mr. George Williams, Mariner Realty Associates regarding Marina [sic] Realty Associates, Inc.

"Dear George, this will respond to your memorandum dated December 23, 1991. While the present transaction may [225] present a good opportunity for Mr. Yost to obtain personal concessions from Ibernia, I do not deem it appropriate for that to be a provision of the real estate agreement, nor do I deem it appropriate for you or me to seek such concessions. Stated simply, this would put us in

a potential conflict of interest position with respect to a Chapter XI debtor by whom you and I are both employed.

* * *

[226] "I would encourage Mr. Yost to seek his own separate legal representation in this regard, so that he may ensure the protection of whatever legal rights he may have.

"You and I have a fiduciary obligation to the Chapter XI debtor, to the Bankruptcy Court, which requires us to scrupulously avoid any appearance of a conflict. I trust that you will be guided accordingly as will I.

* * *

Q Didn't that mean to you that if Mr. Yost wanted to exact some type of personal benefit out of Mariner Realty's need to sell Mariner Mall that you and Mr. Fleming shouldn't be spending time on that. Mr. Yost should get somebody else to do it because it was to the benefit of Mariner Mall and Mariner Realty that you sell this shopping center, whether [227] Mr. Yost got any personally liability release or not?

A That's correct, yes, sir.

* * *

Q I believe I have handed you defendant Fleming's Exhibit 30J, is that – do you recognize that document?

A Yes, sir. It's June 18, 1991 excerpt from my Day Timer.

Q I believe that may be the page of your Day Timer that we were mentioning a little while ago concerning a communication from Mr. Fleming reminding you where your loyalty was?

A Yes, sir.

Q Would you read that, so that we will have the quote correct?

A Yes, sir.

* * *

[228] A Okay. "Phone with DLF," meaning Mr. Fleming, in quotes, "you work for MRA," Mariner Realty Associates, "not WCY," meaning Wallace C. Yost.

Q Wasn't it an ongoing battle for Mr. Yost trying to pull you towards doing things that would help him, even if it wasn't good for Mariner Realty on the one hand, and Mr. Fleming on the other hand saying pay attention to our responsibility to Mariner Realty and let Mr. Yost deal with it himself, his own problems?

A Yes, sir, I would say that's an accurate statement.

* * *

[231] Q Okay. Let's talk some more about the November 18th indication in your Day Timer notes that you have already read about. You read that during your direct examination.

A The 28th?

Q Yes, I'm sorry. I believe it is the 28th. That particular notation to you meant that Mr. Yost wanted to undertake some type of transaction with Mrs. Dancaescu

that he thought, and was conveying to you he thought, was an inappropriate, perhaps a manipulative transaction, perhaps a dishonest transaction and that he didn't want Mr. Fleming to know about it because Mr. Fleming might not approve and might stop it, now, isn't that true?

A That's an accurate observation, Yes.

Q Okay. That's what you believed at the time and that's what you still believe, isn't it?

A It is what I believed, and my position at the time was such that in spite of what Mr. Yost said I approached Mr. Fleming about it the following Monday.

Q Okay. As a matter of fact, this pulling one way by Mr. Yost to get you to do things that in your opinion were not good for Mariner Realty, and pulling the other way by Mr. Fleming to remind you that you are supposed to be loyal to Mariner Realty eventually led you to the belief that you probably were gonna get fired, didn't it?

* * *

[233] Q But the sale to Weingarden was what was being held up by Wally Yost because he wanted something out of the deal, didn't he?

A Correct.

Q C&B had a judgment against him. C&B also had a second position on Mariner Mall. So it was to C&B's interest to let it be sold also, wasn't it?

A Yes.

Q And that's where Mr. Yost stepped in and said, I'm not gonna allow it to happen unless something happens for me, such as getting me released from this judgment. What was Mr. Fleming's response to that? His response – let me just [234] see if I'm right about it. He was telling you, we are going to close this deal whether Wally wants to close it or not because it's the best for Mariner Realty; it's the hope of Mariner Realty?

A That's correct.

* * *

Q I believe in an informal conversation sometime in the last few days when I saw you outside we were talking a bit, you indicated that at one point Mr. Yost put a dollar figure on his willingness to consent or maybe it was in addition to his willingness to consent of a hundred thousand dollars. Am I thinking somebody else told me that or is that what you told me?

* * *

A That was the one thing Wally wanted, he demanded that they [235] get a hundred thousand dollars, or demanded to me, anyway.

Q Did you tell Mr. Fleming about that?

A We discussed that.

Q Did he tell you that that wasn't gonna happen?

A Well, that was sort of the context of the – I think it was the December 31st letter.

Q Okay. All right. That's what brought on that letter saying you and he have to steer your course straight,

you've got to get this thing sold and you have got to not be paying attention to what Wally wants, isn't that right?

A Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v. Case No. 3:97cr57/RV

DAVID L. FLEMING,

Defendant.
_____/

COURT'S INSTRUCTIONS TO THE JURY

* * *

11.1
GENERAL CONSPIRACY CHARGE
18 U.S.C. § 371

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another federal crime or offense. Under this law, a conspiracy is an agreement or a kind of partnership in criminal purposes, in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or

the overt acts that the indictment charges would be carried out in an effort to commit the intended crimes.

Also, because the essence of the conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt are these four elements:

First: That two ore more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purposes of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment; and

Fourth: That such overt act was knowingly committed on or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowing committed by a conspirator in an effort to accomplish some object of the conspiracy. The alleged overt acts are set out in the indictment and you should refer to the indictment in considering whether any overt act was knowingly committed.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if the Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict the Defendant for conspiracy, even though the Defendant did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

* * *

(e) The offense of bankruptcy fraud requires that all the following facts are proved beyond a reasonable doubt:

First: That on or about the date charged, there were pending in the United States Bankruptcy Court for the Northern District of Florida Bankruptcy cases wherein the corporate entities named in the indictment were the debtors;

Second: That the property or an interest in the property described in the indictment was a part of the bankruptcy estate of such debtor and

Third: That a Conspirator knowing, willfully and fraudulently concealed the property from creditors.

The term "Debtor" simply means the corporation concerning whom a case under the Federal bankruptcy laws has been commenced. When a debtor files a voluntary petition under the bankruptcy laws, there is created an estate comprised, among other things, of all legal or equitable interests of the debtor in property wherever located and by whomever held as of the commencement of the bankruptcy case. Thus, any interest owned by the bankruptcy debtor in any property at the time the bankruptcy case begins is a part of the bankruptcy estate. The bankruptcy estate also includes proceeds, products, rents, or profits of or from property of the estate.

The essence of the charge in the indictment is the knowing and fraudulent concealment by a Conspirator of property belonging to the estate of the debtor. The term "concealment" or "conceal" is to be given its ordinary meaning, that is, to prevent disclosure or recognition of, or to place out of sight or to withdraw from being observed.

A person "fraudulently conceals" property of the estate of a debtor when that person knowingly withholds information or property, or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or to cheat a creditor or a custodian ordinarily for the purpose of causing some financial loss to another or bringing some financial gain to one's self.

The term "creditor" means a person or company that has a claim or a right to payment from the debtor that

arose at the time of or before the bankruptcy court entered its order for relief concerning the debtor.

Fraudulently concealing property of the estate of the debtor may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or whereabouts or property, or knowingly doing anything else by which that person acts to hinder, delay or defraud any of the creditors.

In this case, the charge of conspiracy to commit bankruptcy fraud only relates to the circumstances surrounding the sale of the home at 112 Matamoros and the related bankruptcy proceedings of Mariner Realty Associates, Inc.

* * *

(2)

Supreme Court, U.S.
FILED
APR 2 [illegible]

No. 99-1422

In the Supreme Court of the United States

DAVID L. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

19 pp.

QUESTIONS PRESENTED

1. Whether petitioner's prosecution for conspiracy to commit bankruptcy fraud was brought within the applicable statute of limitations.

2. Whether petitioner's conviction for conspiracy to commit bankruptcy fraud was improper on the ground that the underlying object offense was legally impossible.

3. Whether the trial court committed plain error by not instructing the jury on the government's burden to prove materiality in a bankruptcy fraud charge.

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In the Supreme Court of the United States

No. 99-1422

DAVID L. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is unpublished, but the judgment is noted at 193 F.3d 522 (Table). The order of the district court (Pet. App. 23-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1999. A petition for rehearing was denied on December 23, 1999. The petition for a writ of certiorari was filed on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 1651(a), and 2241(a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to 18 months' imprisonment, to be followed by three years' supervised release. He was also ordered to pay $50,000 in restitution to the United States Bankruptcy Court. The court of appeals affirmed. Pet. App. 1-22.

1. Beginning in 1989, petitioner, who is an attorney, represented Wallace C. Yost, a real estate developer, in matters relating to several real estate properties that Yost owned in northwest Florida. Pet. App. 23-24. Yost began experiencing financial difficulties in the late 1980s. By 1989, several banks had instituted foreclosure actions against several of Yost's properties. *Id.* at 24. During that period, petitioner advised and assisted Yost to transfer real estate held in Yost's name to a number of corporations controlled by Yost. *Ibid.* On petitioner's advice, each of those corporations then immediately filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Petitioner prepared the title transfers and the bankruptcy petitions, and filed them all on the same day. *Id.* at 6.

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[1] The jury found petitioner guilty on one count of conspiracy to commit bank fraud, bankruptcy fraud, mail fraud, wire fraud, and money laundering, all in violation of 18 U.S.C. 371, and two counts of bank fraud, in violation of 18 U.S.C. 1344 and 2. The district court granted petitioner's motion for judgment of acquittal as to the two bank fraud counts and as to the bank fraud objective of the conspiracy count. Pet. App. 23-44. The district court also later held that the mail fraud, wire fraud, and money laundering objectives of the conspiracy count were barred by the statute of limitations. *Id.* at 4.

One of the parcels of real estate that petitioner helped Yost transfer was a residence located at 112 Matamoros Drive, in Pensacola Beach, Florida (the Matamoros property). That property was transferred to Mariner Realty Associates, Inc. (MRA), which was one of the corporations controlled by Yost. Title to the Matamoros property was in both Yost's and his wife's name, but the quit-claim deed transferring title to MRA was signed only by Yost. Pet. App. 27. MRA filed for bankruptcy immediately after the transfer of the Matamoros property.

In early 1991, MRA reached agreement to sell the Matamoros property, including all items of personal property in the house, for $250,000. Yost sought petitioner's assistance in keeping some of the proceeds from the sale from going to MRA's bankruptcy estate. Pet. App. 27. Petitioner advised Yost that the sale could be structured so that $200,000 of the sale price would go to the bankruptcy estate to pay off the mortgage on the property, while $50,000 would go to Yost personally for the sale of the personal property in the house. *Ibid.* Under that arrangement, only $200,000 of the total sale price would be disclosed to the MRA bankruptcy estate.

The actual value of personal property in the house on the Matamoros property was between $25,000 and $30,000. Yost, however, followed petitioner's directions and prepared a list claiming the personal property was worth $50,000. Pet. App. 28. Petitioner filed notice in the bankruptcy court of Yost's intent to sell the Matamoros property, but he omitted any mention of the $50,000 "personal property" payment. *Id.* at 8.

The sale of the Matamoros property was completed in early June 1991. At that time, the $50,000 allocated to the sale of the personal property was placed in

petitioner's escrow account. Yost received $38,000 of those funds; petitioner retained the remainder as attorney's fees. Pet. App. 28. On June 18, 1991, the bankruptcy trustee deposed petitioner to determine how much money Yost had paid petitioner for his services in matters relating to the MRA bankruptcy. Petitioner stated that Yost had paid him less than $10,000, and that all such payments had been made before the end of December 1989. *Id.* at 9; Gov't C.A. Br. 11. Petitioner did not, therefore, disclose to the trustee the fee that he received for the "personal property" transaction associated with the sale of the Matamoros property earlier that month.

Petitioner continued to represent MRA in its bankruptcy proceedings after the sale of the Matamoros property. Pet. 10. Those proceedings were closed on September 20, 1993 with the confirmation of a Chapter 11 liquidation plan. R. Doc. 103, at 13.

2. On May 28, 1997, petitioner was indicted on two counts of bank fraud (in violation of 18 U.S.C. 1344 and 2) and one count of conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud (in violation of 18 U.S.C. 371). Before trial, petitioner filed a motion to dismiss, contending, *inter alia*, that the charge of conspiracy to commit bankruptcy fraud was barred by the five-year limitations period set out in 18 U.S.C. 3282.[2] The court rejected that argument. Noting that the substantive

---

[2] 18 U.S.C. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

offense of bankruptcy fraud is a continuing offense and that its limitations period is "tolled until the final discharge or denial of discharge of the debtor," the court reasoned that the limitations period for conspiracy to commit bankruptcy fraud is similarly tolled. R. Doc. 103, at 13. Accordingly, "[b]ecause the [MRA bankruptcy] proceeding was closed within five years of the indictment," the court held that "the charge of conspiracy to commit bankruptcy fraud is not barred, whether considered under [18 U.S.C.] 3284 [which supplies the limitations period for bankruptcy fraud] or under the general statute of limitations provided by Section 3282." *Ibid.*[3]

Following a seven-day trial, the jury returned guilty verdicts against petitioner on all counts. The district court granted petitioner's post-trial motion for judgment of acquittal as to the two bank fraud counts and the bank fraud objective of the conspiracy count. Pet. App. 23-44. The district court also later held that the statute of limitations barred the mail fraud, wire fraud, and money laundering objectives of the conspiracy count. *Id.* at 4.

The district court denied petitioner's motion for judgment of acquittal on the charge of conspiracy-to commit bankruptcy fraud. Pet. App. 37-39. That charge focused on petitioner's concealment from the bankruptcy court of the $50,000 in "personal property" involved in the sale of the Matamoros property.

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[3] 18 U.S.C. 3284 provides:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

Petitioner maintained that because title to the Matamoros property had been in both Yost's and his wife's name, and because only Yost signed the quit-claim deed transferring the property to MRA, the property never properly became part of the bankruptcy estate. Accordingly, petitioner argued, the concealment of assets relating to the sale of the Matamoros property could not constitute bankruptcy fraud. The district court rejected that argument. After noting that "all the parties treated the property as a part of the bankruptcy estate," the court held that "[e]ven [if] * * * it was impossible for [petitioner] to commit the substantive offense of bankruptcy fraud, impossibility is not a defense to a conspiracy charge." *Id.* at 38.

3. The court of appeals affirmed. The court first held that the charge of conspiracy to commit bankruptcy fraud was not barred by the statute of limitations. Pet. App. 10-15. The court held that just as the substantive offense of bankruptcy fraud is a continuing offense, conspiring to commit that offense "is itself a continuing violation for which the five-year statute of limitations period set forth in § 3282 does not begin to run until either the discharge of the bankruptcy or the denial of discharge, or in situations where neither of those two alternatives is available, at the closing of the bankruptcy case file." *Id.* at 14. The court arrived at that holding by "treat[ing] each day following the concealment of the asset as a continuation of [the] last overt act" of the conspiracy. *Id.* at 15. On that analysis, petitioner's conspiracy to commit bankruptcy fraud continued until the close of the MRA bankruptcy proceeding in September 1993, and the indictment returned against petitioner in May 1997 was within the five-year limitations period under Section 3282.

The court of appeals also rejected petitioner's argument that he was improperly convicted of conspiracy to commit bankruptcy fraud because he could not have been convicted of the substantive offense of bankruptcy fraud. The court found that petitioner's actions in connection with the Matamoros property showed that he "had the requisite intent to commit bankruptcy fraud by concealing from the bankruptcy estate certain proceeds from the sale of property which he placed in that estate and which he asserted belonged there." Pet. App. 18. The court further found that "the object of [petitioner's] conspiracy, as [petitioner] saw it, was indeed a federal crime," because petitioner believed that the Matamoros property was part of the bankruptcy estate. *Id.* at 19. Applying the "well-established principle" (*id.* at 17) that conspiring to commit a crime and committing the crime itself are two separate offenses, the court held that petitioner could be convicted for conspiring to commit bankruptcy fraud even if the bankruptcy fraud he conspired to commit was legally impossible because the property at issue was not properly part of the bankruptcy estate.

Petitioner filed a petition for rehearing in the court of appeals. In that petition, he contended for the first time that the trial court erred by not instructing the jury that the government must prove materiality in order to establish the offense of bankruptcy fraud. The court of appeals denied rehearing without comment. Pet. App. 45-47.

ARGUMENT

Petitioner raises three issues in his petition to this Court. First, he contends that the charge of conspiracy to commit bankruptcy fraud should have been dismissed as time-barred. Second, he argues that he could

not be convicted of conspiracy to commit bankruptcy fraud because the object of the conspiracy—concealing from the bankruptcy estate certain proceeds from the sale of the Matamoros property—was not a federal offense. Third, he renews an argument raised for the first time on petition for rehearing before the court of appeals: that the district court erred by failing to instruct the jury on the requirement of materiality in bankruptcy fraud. Petitioner's contentions are without merit, and there is no conflict warranting this Court's review.

1. The court of appeals correctly determined that the five-year statute of limitations did not bar petitioner's prosecution for conspiring to commit bankruptcy fraud. As this Court has long recognized, "[s]tatutes of limitations normally begin to run when the crime is complete." *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943). Where the crime at issue is a conspiracy, the crime is not complete when the elements of the offense are first satisfied. Rather, conspiracy is "[t]he classic example of a continuing offense." *United States* v. *Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). For continuing offenses, the statute of limitations begins to run only when the offense "expires." *Id.* at 876.

Here, the court of appeals correctly identified two relevant statutes of limitations. The general statute of limitations, 18 U.S.C. 3282, provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted * * * for any offense, not capital, unless the indictment is found * * * within five years next after such offense shall have been committed." A separate provision, 18 U.S.C. 3284, applies specifically to the concealment of a Chapter 11 debtor's assets from a bankruptcy estate, the object offense underlying the

conspiracy count at issue here. Section 3284 defines such concealment of assets as a "continuing offense until the debtor shall have been finally discharged or a discharge denied," and provides that the statute of limitations "shall not begin to run until such final discharge or denial of discharge." The court of appeals reasonably read Section 3282 in light of Section 3284 and concluded that, when the charged conspiracy involves concealing assets from a bankruptcy estate, the limitations period for the conspiracy does not begin to run until the last day before discharge of bankruptcy, *i.e.*, the date when the continuing object offense is completed. Pet. App. 15. Under that reading, "each day following the concealment of the asset [is] a continuation of that last overt act" in furtherance of the conspiracy. *Id.* at 15.[4] In this case, because the MRA bankruptcy was not discharged until September 1993 (see R. Doc. 103, at 13), the court of appeals correctly held that the May 1997 indictment was returned within the five-year limitations period.

Contrary to petitioner's assertions (Pet. 11-12), any tension between the court of appeals' unpublished decision and *United States* v. *Dolan*, 120 F.3d 856 (8th Cir. 1997), does not warrant this Court's review. In *Dolan*, the defendant was charged with conspiracy to conceal property of a bankruptcy estate. The evidence showed that the defendant had committed an overt act within five years of being indicted, thus satisfying the limitations period contained in Section 3282. See

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[4] As the court of appeals recognized, to hold otherwise would be to prevent a prosecution for conspiracy to conceal an asset of a bankruptcy estate on the ground that the conspirators were successful in their efforts to conceal assets. Pet. App. 14-15. The court properly construed Section 3282 so as to avoid such an absurd result.

Dolan, 120 F.3d at 864-865. Accordingly, since the defendant in that case clearly had committed overt acts within the five-year period prescribed by Section 3282, the court was not required to issue a definitive holding on Section 3284's effect on the limitations period for a conspiracy to commit bankruptcy fraud. Petitioner identifies no other court of appeals decision addressing the appropriate statute of limitations for a charge of conspiracy to commit bankruptcy fraud. Given the paucity of lower court cases directly addressing the issue, this Court's review is not warranted.

2. Petitioner also argues (Pet. 15-19) that he was wrongly convicted on the conspiracy count because the object of the conspiracy—concealing some of the proceeds from the sale of the Matamoros property—was not a federal offense. He bases that claim on the observation that the Matamoros property was never properly a part of the bankruptcy estate, such that proceeds from its sale could not have been illegally concealed. In rejecting that argument, the court of appeals concluded that even if the Matamoros property was never properly transferred to the bankruptcy estate, petitioner "had the requisite intent to commit bankruptcy fraud by concealing from the bankruptcy estate certain proceeds from the sale of property which he placed in that estate and which he asserted belonged there." Pet. App. 18. Thus, "the object of [petitioner's] conspiracy, as [petitioner] saw it, was indeed a federal crime." *Id.* at 19. That fact-bound determination does not warrant further review by this Court.

Moreover, even if the Matamoros property was never properly a part of the bankruptcy estate so that the concealment of the proceeds from its sale could not constitute a federal offense, the court of appeals correctly held that such legal impossibility does not preclude

conspiracy liability. See Pet. App. 20-21. As this Court has explained, "A person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 64 (1997); see *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915). Accordingly, "[w]here * * * an indictment alleges conspiracy, legal impossibility affords a conspirator no defense." *United States* v. *Trapilo*, 130 F.3d 547, 552 n.9 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); see *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[T]he impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989); *United States* v. *Petit*, 841 F.2d 1546, 1550 (11th Cir.), cert. denied, 487 U.S. 1237 (1988); *United States* v. *Everett*, 692 F.2d 596, 599 (9th Cir. 1982), cert. denied, 460 U.S. 1051 (1983). In this case, therefore, even if the object offense was legally impossible because the Matamoros property was never part of the bankruptcy estate, the court of appeals correctly held that petitioner could still be convicted of conspiracy to commit that offense.

The Ninth Circuit's decision in *Lubin* v. *United States*, 313 F.2d 419 (1963), overruled on other grounds, *United States* v. *Valles-Valencia*, 823 F.2d 381, 381-382 (9th Cir. 1987), is not to the contrary. In that case, the defendants were charged with conspiring to steal money belonging to federally insured banks. The money that the defendants stole was in an armored car at the time they stole it. The court held that the indictment alleged a federal offense only if the defendants conspired (with the intent) to steal property or money belonging to a federally protected bank, not belonging to the armored car company. *Lubin*, 313 F.2d at 420. Because the government could not establish

such intent, the court reversed the defendants' convictions for failure to state a federal offense. The circumstances of this case distinguish it from *Lubin*. Here, the court of appeals found that "the concealment of assets was unquestionably from the bankruptcy estate," and that petitioner "conspired to conceal assets from the bankruptcy estate – such concealment being a clear violation of federal law." Pet. App. 19. Accordingly, because petitioner conspired to violate federal law in this case, *Lubin* is inapposite.[5]

3. Finally, petitioner argues (Pet. 19-21) that the district court erred in not instructing the jury that in order to find petitioner guilty of bankruptcy fraud (or conspiracy to commit bankruptcy fraud), it had to find that petitioner had materially defrauded the bankruptcy estate. Petitioner did not raise that argument until his petition for rehearing before the court of appeals. Therefore, he has waived it. See *United States* v. *Bouyea*, 152 F.3d 192, 195-196 (2d Cir. 1998) (per curiam) (deeming a challenge to a jury charge raised for the first time in a petition for rehearing to be waived), cert. denied, 120 S. Ct. 245 (1999); *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996) (per curiam) (issues or arguments raised for the first

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[5] The Ninth Circuit itself has limited *Lubin*'s scope. In *United States* v. *Sanford*, 547 F.2d 1085 (1976), the Ninth Circuit held that defendants charged with conspiracy to transport illegally killed wildlife in interstate commerce could be prosecuted for that offense even though the scheme, if completed, would not have constituted a federal offense because federal undercover officers were the ones who killed the wildlife in question. The court held that "the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . ., and is not at all dependent upon the ultimate success or failure of the planned scheme." *Id.* at 1091 (citation omitted).

time on petition for rehearing will not be considered), cert. denied, 519 U.S. 1133 (1997); *United States* v. *Estrada-Trochez*, 66 F.3d 733, 736 (5th Cir. 1995); *Boardman* v. *Estelle*, 957 F.2d 1523, 1534 (9th Cir.), cert. denied, 506 U.S. 904 (1992).

Even if petitioner has not waived his argument on this point, because he failed to raise it at trial he must establish plain error in order for reversal to be warranted. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 732 (1993); Fed. R. Crim. P. 52(b). Petitioner cannot carry that burden. To establish plain error, petitioner must demonstrate that the district court's omission of a materiality instruction was (1) an error, (2) that was plain, and (3) that affected his substantial rights. Even if those three conditions are met, this Court will notice the forfeited error only if it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Johnson*, 520 U.S. at 466-467; *Olano*, 507 U.S. at 732. In *Johnson*, this Court held that although materiality is an element of perjury under 18 U.S.C. 1623 and should be decided by the jury, a district court's failure to submit the materiality issue to the jury was not plain error. The Court questioned whether the district court's error affected substantial rights, but avoided resolving that issue because it was clear that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See 520 U.S. at 469-470. In reaching that conclusion, the Court stressed that "the evidence supporting materiality was 'overwhelming,'" and that "[m]ateriality was essentially uncontroverted at trial." *Id.* at 470.

In this case, the district court's instructions to the jury did not impair petitioner's substantial rights. Although the court did not explicitly instruct the jury

on materiality, its instruction on fraudulent concealment implicitly satisfied the requirement for such an instruction. In the bankruptcy fraud context, materiality is satisfied where "the false oath or account * * * pertain[s] to the discovery of assets or to the debtor's financial transactions." *United States* v. *Gellene*, 182 F.3d 578, 588 (7th Cir. 1999). Here, the district court instructed the jury that "[a] person 'fraudulently conceals' property * * * when that person knowingly withholds information or property, or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or to cheat a creditor or a custodian." Pet. App. 64. Thus, any error in the instructions was not so great as to affect petitioner's substantial rights.

In any event, the district court's instructions did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings in this case. As in *Johnson*, ample evidence of materiality was introduced at trial. In particular, petitioner's conspiracy to conceal part of the proceeds from the Matamoros property sale clearly "pertain[ed] to the discovery of assets or to the debtor's financial transactions." *Gellene*, 182 F.3d at 588. Accordingly, any error by the district court did not rise to the level of plain error.[6]

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[6] This Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), is not to the contrary. That case did not involve a plain error analysis, as the defendant objected to the district court's materiality instruction at trial. *Id.* at 5-7. Thus, even if *Neder*'s analysis of the need for a materiality instruction in the mail fraud, bank fraud, and wire fraud contexts applies in the bankruptcy fraud context as well, *Neder* does not establish that failure to give such an instruction constitutes plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

Supreme Court, U.S.
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No. 99-1422

In The

Supreme Court of the United States

DAVID L. FLEMING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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5 pp

INTRODUCTION

Petitioner is generally satisfied that his original petition already addresses all of the arguments set forth in the Brief for the United States in Opposition. However, Petitioner feels compelled to submit this short reply to respond to a materially misleading statement contained in the government's factual statement.

GOVERNMENT'S STATEMENT

In the government's statement, at page 4 of its brief, the government appears to contend that the question posed to petitioner at his June 18, 1991 deposition would have obligated him to disclose the payment he received from the personal property proceeds and that petitioner, therefore, concealed such payment from the United States Trustee and/or committed perjury. The actual question asked and the answer given are as follows:

> "Q Excuse me. Let me narrow the question. With respect to these cases, what dollar amounts have you been paid towards these cases from nondebtor sources?
>
> A With regard to Mariner Realty Associates, Mariner Enterprises of Pensacola, Mariner Enterprises of Fort Walton, and Mariner Enterprises of Panama City, collectively, Mr. Yost has probably paid less than $10,000. And that was probably paid prior to December – the end of December 1989, or shortly thereafter, which was the time when the escrow accounts were created."

Thus, it is readily apparent that the question was asked only as to work done on the referenced bankruptcy cases and that it did not ask for disclosure of payments received for nonbankruptcy work done for Wallace and Sara Yost. It is undisputed in this case that the payment received by petitioner from the personal property sale was for nonbankruptcy work done by petitioner for Mr. and Mrs. Yost. Since petitioner has already pointed out in his initial petition that the testimony was not false and that the court of appeals' reliance on such an impertinent and immaterial factual conclusion was a mistake, it is indeed unfortunate that the government would perpetuate that mistake by using it as a factual basis for its argument here.

GOVERNMENT'S ARGUMENT

Since the need for this reply is presented, petitioner will use the opportunity to point out one very misleading argument contained in the government's brief, even though it should be readily apparent to the Court. At page 14 of the government's brief, the government attempts to tie a quote from *United States v. Gellene*, 182 F.3d 578, 588 (7th Cir. 1999), to the jury instruction given in the present case. Petitioner would remind the Court that he was not charged in this case with conspiracy to make a false oath or account. Materiality in the context of an alleged concealment of property would obviously be

different.[1] The government does not otherwise explain how the noted instruction could conceivably be deemed to be an adequate substitute for an instruction as to materiality.

With regard to the government's contention that petitioner waived his ability to rely upon the lack of a materiality instruction, petitioner concedes that his counsel did not request such an instruction at trial. Petitioner suggests, however, that such a request would have been futile prior to this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), given the law as it existed in the Eleventh Circuit. Moreover, petitioner has not even had the opportunity that the defendant had in *Neder* to have the trial court make a factual determination as to materiality. Certainly this court is not in a position to make such a determination based solely upon the representations contained in the government's brief. This is the reason that petitioner suggested in his original petition that the court may prefer to utilize *habeas corpus* jurisdiction in this case.

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[1] Cases such as *United States v. Edgar*, 971 F.2d 89 (8th Cir. 1992) strongly suggest by analogy that in a concealment case the instruction would require that the subject property be property of the debtor or otherwise material to the administration of the case (i.e., property as to which the exemption is questioned).

CONCLUSION

The government's brief does not appear to seriously challenge the jurisdiction of the Court to grant certiorari in this case or the appropriateness thereof. For the reasons set forth in petitioner's original petition, as supplemented herein above, petitioner again suggests that the Court does have the jurisdiction to hear this case and renews his request that the Court exercise its discretion in favor of hearing the case.

Respectfully submitted,

DAVID L. FLEMING